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ADOPTION OF THE FEDERAL SENTENCING GUIDELINES
BY COURTS-MARTIAL

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, or any other governmental agency.

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41ST JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1993

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ABSTRACT: A comparative analysis of the United States sentencing Guidelines to the military sentencing process concludes that the Department of Defense should develop and implement military sentencing guidelines. Due to the experiences of the United States Sentencing Commission, the military should parallel, but not adopt in toto the federal Guidelines. Federal Guidelines reduce disparity and create uniformity in sentencing. Disparity and outdated sentencing procedures hinder equitable military justice. Inequitable military justice often breeds discontent among servicemembers. Discontent servicemembers become disciplinary problems through disobedience of laws and regulations. Military sentencing guidelines, uniformly applied to all the branches of the armed forces, would promote discipline by reducing sentencing disparity.

**ADOPTION OF THE FEDERAL SENTENCING GUIDELINES
BY COURTS-MARTIAL**

Criston E. Klotz
Major
U.S. Marine Corps

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ADOPTION OF THE UNITED STATES SENTENCING GUIDELINES

BY COURTS-MARTIAL

By Major Criston E. Klotz

I. INTRODUCTION

Nothing is more dangerous than [consulting] the spirit of the law....The spirit of the law [is]...dependent on the good and bad logic of a judge, on a sound or unhealthy digestion, on the violence of his passions, on the infirmities he suffers, on his relations with the victim, and on all the slight forces that change the appearance of every object in the fickle human mind.

CAESAR BECCARIA, an 18th Century Scholar¹

The United States Sentencing Guidelines (Guidelines) were implemented November 1, 1987.² The Guidelines were Congress' attempt to reduce sentence disparity, decrease crime, practice truth-in-sentencing,³ and revive the waning confidence of the American people in the federal criminal justice system.⁴ Many scholars and political officials agreed. As a result, in 1984, Congress enacted the Sentencing Reform Act.⁵

Under the Sentencing Reform Act, the United States Sentencing Commission (Commission),⁶ a newly created government entity, was assigned the monumental task of drafting a plan to implement Congress' sentencing objectives.⁷ That plan, three

years in the making, culminated in the Guidelines.⁸ Since October 1984, the road travelled by the Commission in drafting, implementing, and amending the Guidelines has been long, steep, and winding.

Jurists, legal scholars, law practitioners, and law enforcement officials have praised and condemned⁹ the Guidelines with equal vehemence. Most agree that outward disparity is decreasing, but many complain that the cost to society is too great: increased workload, escalating prison population, and mechanical sentencing.¹⁰

Many who use or study the Guidelines wonder if the Guidelines are meeting Congressional goals.¹¹ Some suggest that the question is irrelevant because no matter how they work the Guidelines are here to stay. Those who believe the Guidelines are a permanent part of the federal system insist that the Commission should focus on keeping the good parts and fixing the bad, not rebuilding the entire system. Others contend that Congress should start over with a completely new design.¹² Considering that Congress took almost ten years to enact the Sentencing Reform Act,¹³ Congress will not likely discard the system it took so long to create.

After reading the multitude of scholarly works addressing the many facets of the Guidelines,¹⁴ the old saying that one man's junk is another man's treasure seems very apropos. Depending on the eyes of the beholder, the Guidelines sparkle

like a diamond or like a piece of coal. Many critics forget that a piece of coal may one day become a diamond.

From the coal mines of antiquated military justice, emerged the diamond of the military's criminal justice system, the Uniform Code of Military Justice (UCMJ).¹⁵ Due to an increasing public awareness of disciplinary injustices meted on the servicemembers during World War I and World War II,¹⁶ and the need for a uniform set of laws and procedures for the military,¹⁷ Congress in 1951 gave the newly created Department of Defense¹⁸ the UCMJ.

The creation, adoption, and implementation of the UCMJ followed much of the same road that the Guidelines are now travelling. After 42 years and numerous amendments, the UCMJ has become a way of life for the servicemember. Through these 42 years of growth and development, political officials, scholars, the public, and, most importantly, the servicemembers have grown to respect the military justice system. The one emerging blemish in its sparkling history concerns sentencing practices.¹⁹

As a microcosm of society, the military reflects, to some degree, society's strengths and weaknesses. Because of the military's mission and the caliber of servicemembers working to meet that mission, the military must stay abreast of society. Through the Commission, society invalidated rehabilitation as a goal for punishing offenders and attacked the wide disparity in punishments adjudged on like offenders.²⁰

Some servicemembers recognize the same inadequacies in the military's sentencing system²¹ as those recognized by society in the federal system. Others argue that the military's system is a known, dependable system that works fine, so why change.²² Two reasons come to mind. One, if society changes its system of punishment and the military is a microcosm of society, then political and public outrage will eventually result unless the military system adopts society's change in philosophy. Two, since the UCMJ was enacted in 1951, its basic tenets have remained unaltered. During that same period of time, the military has undergone drastic policy changes in personnel, technology, and mission. Change should not be advocated simply for the sake of change, but change should be made for the sake of justice.

Section II of this thesis will discuss major aspects of the Guidelines for military sentencing procedures. Section III will discuss the legislative, executive, and judicial history of sentencing in courts-martial. Section IV will analyze the adaptation of the Guidelines to courts-martial. Section V discusses in general terms recommended changes to the UCMJ and Manual for Courts-Martial to implement military sentencing guidelines. The Appendices contain historical data concerning courts-martial, sentences, resultant confinement, and appeals.

II. UNITED STATES SENTENCING GUIDELINES

The guidelines are a tribute to the Commission and its staff, which have made them workable in spite of a complex enabling statute and considerable hostility from judges and lawyers.

*Judge Jack B. Weinstein, Eastern District of New York*²³

A. HISTORY OF GUIDELINES DEVELOPMENT

Until very recently federal district court judges possessed virtually unfettered discretion²⁴ when meting out an accused's sentence. Unless a statutory minimum or maximum existed for the offense of conviction, the sentencer could adjudge any punishment. If the punishment included imprisonment, then the parole system applied its rehabilitative programs. At the successful completion of these programs, not the completion of the adjudged sentence, the accused was paroled.²⁵ Congress through its legislative powers, legal scholars through their written and oral presentations, legal practitioners through their complaints, and the public through its outcry, demanded reform of the rehabilitative-based federal sentencing system.

1. The Rehabilitative Model

Historically, rehabilitation is a relatively new sentencing philosophy. Prior to the rehabilitative model, other popular sentencing philosophies included Mosaic law where it was an "eye for an eye"²⁶ and Roman law where the offender was often punished in the public arenas.²⁷ In the late 1800s, the sentencing focus

of the United States shifted from retribution to rehabilitation of the offender. The rehabilitative movement in sentencing coincided with this country's shift from fighting Indians and other Americans, to developing an industrial-based society. Rehabilitation remained America's central sentencing theme until enactment of the Crime Control Act of 1984.²⁸

The increase in industry brought advanced means of communication with which to communicate and develop new ideas about treatment of the working class. Soon this age of enlightenment crept into the prison system. Crime occurred because prisoners were not treated for their criminal behavior and not trained to be productive citizens. As a result of this attitude, criminal rehabilitation became known as "positivist criminology."²⁹ Medical terms were often associated with criminal conduct; doctors considered crime a treatable disease.³⁰ Those who did not think of criminal conduct as a disease believed society had a responsibility to provide therapy and treatment before returning the prisoner to society.

At the same time the prisons were reforming their penology programs, the courts and Congress were reforming criminal laws. If criminal conduct was a disease and the prisons were developing strategies to cure the disease, then the courts and Congress reasoned that sentences to imprisonment should reflect this new ideology.³¹ Prisons retained prisoners, not based on completion of their adjudged period of confinement, but on the prisoner's satisfactory completion of the applicable treatment program.

Indeterminate sentencing resulted from this flexible approach to prison terms.

In 1910 Congress officially jumped on the rehabilitation bandwagon by establishing individual Boards of Parole for each federal penitentiary.³² Congress established a criminal justice system where it would set maximum punishment limits, the judiciary would adjudge an appropriate sentence, and parole officers would determine actual release dates based on the prisoner's rehabilitation.³³ Usually after serving one-third of the sentence, the prisoner became eligible for parole.³⁴ The Supreme Court blessed the rehabilitative system in 1949 in *Williams v. New York*.³⁵ Passage of the Crime Control Act of 1984³⁶ broke this fragile dichotomy between the judge's sentencing role and the parole officer's rehabilitative role.

2. The Death Knell for Rehabilitative Sentencing

Empirical-studies and public concern over the rehabilitative model coincide with the post World War II media revolution. With the ever increasing popularity of the radio, the enormous growth of newspaper circulation caused by the war, and the advent of the television into America's homes, the media bombarded the public with the current events. The conclusion of the war forced the media to find other news. They focused on the news back home. Crime in the streets, treatment of prisoners, court sentences, and prisoner releases made news because it effected every American. The public saw, read, and heard how the federal

criminal justice system was working and became increasingly alarmed at what it learned.³⁷

Concomitant with the public's enlightenment, several legal scholars joined in the crime research boom. During the 1950s and 1960s scholars performed studies to determine what to do about a criminal justice system that lacked consistency and rationality.³⁸ One of the most famous study groups, the National Commission of Reform of Federal Criminal Laws, chaired by Edmund G. Brown, Governor of California, became known as the Brown Commission.³⁹

After five years of study, the Brown Commission, in its final report in 1971,⁴⁰ called for extensive sentencing reform. Catalyzed by these findings Judge Marvin L. Frankel delivered a series of lectures (the Marx lectures) at the University of Cincinnati Law School.⁴¹ During these lectures, he first introduced the idea of a federal sentencing commission.⁴² Some listeners viewed his findings and conclusions contemptuously.⁴³ To silence his critics Judge Frankel caused a study to be done in his circuit, the Second Circuit.⁴⁴ The results of that study confirmed the findings of the Brown Commission; that sentencing disparity resulted in widely divergent sentences for similar offenders committing similar offenses.

Scholars from Yale Law School who heard Judge Frankel's comments decided to set up sentencing workshops to explore federal sentencing practices.⁴⁵ In 1977, Yale published a study based on its workshops where the authors argued for: creation of

a sentencing commission; establishment of sentencing guidelines; appellate review of sentences; and the abolition of parole.⁴⁶ The death knoll for indeterminate sentencing had sounded.

B. CONGRESSIONAL RESPONSE

In the Sentencing Reform Act, Congress painted in broad strokes⁴⁷ the purposes and requirements of a federal determinate sentencing system and created the Commission to implement congressional goals. The duties, powers, and responsibilities of the Commission were set forth in title 28, United States Code.⁴⁸ Congress instructed the Commission to develop a system of guidelines consistent with title 18, United States Code, that would satisfy congressional goals.⁴⁹

At the time of enactment of the Sentencing Reform Act, three states were following state sentencing guidelines: Minnesota, Pennsylvania, and Washington.⁵⁰ Minnesota's system was the only one that had been in operation for any significant length of time.⁵¹ As a result, the Commission studied Minnesota's system and heard from Professor Parent on numerous occasions.⁵²

1. The Commission

After hearing comprehensive testimony, considering numerous scholarly commentaries, and reviewing the history of the Minnesota sentencing guidelines, Congress decided that the Commission should have seven voting members from divergent backgrounds.⁵³ To implement Congress' vision of fair sentencing, the Commission was told to develop guidelines that would "strike a balance between the societal need for certainty, justness, and

uniformity of punishment, and fairness to the offender."⁵⁴ To fulfill its vision, Congress provided the Commission broad powers to draft, implement, and monitor the new Guidelines.⁵⁵ Perhaps this broad delegation, besides creating a legal issue regarding impermissible delegation of authority, fomented some of the criticism regarding the Commission's seemingly high-handed approach to Guideline implementation and change.

2. Development of the Guidelines

As noted by Judge Jack B. Weinstein, the Commission accomplished a very complex task despite hostility from judges, scholars, and lawyers.⁵⁶ Due to the complexity of the legislation and the constant debate, the Commission spent a year trying to decipher the Congressional directives, then another year and a half writing the Guidelines.⁵⁷ During that period of time, the Commission heard from concerned parties at public hearings, at committee meetings, and through correspondence. Before the Commission submitted the final draft of the Guidelines to Congress on April 13, 1987, the Commission considered 1020 written comments and the oral testimony of 213 witnesses.⁵⁸

When drafting the Guidelines, the Commission debated and resolved four problem areas: deciding the governing rationale of the Guidelines, whether the Guidelines would support a real offense or conviction charge system of punishment, how to determine Guidelines sentences, and how to balance uniformity and proportionality while attempting to reduce disparity.⁵⁹ These

issues continue to form the underlying basis for criticism of the Guidelines.

In deciding what theory or theories of punishment the Guidelines should encompass, the Commission was split both internally and externally by factions from two basic camps.⁶⁰ One camp, with Professor Andrew von Hirsch as the main proponent espoused a "just desert" theory of punishment.⁶¹ The other group argued for crime control as the purpose for sentencing.⁶² After much debate, six of the seven Commissioners voted to adopt not one specific punishment theory, but the four purposes articulated by section 3553 (a)(2) of title 18, U.S. Code.⁶³

After settling on a punishment theory, the Commission debated the type of punishment system to incorporate into the Guidelines. Under a charge conviction system, the judge determines the appropriate punishment based on the charges and their attendant facts for which the accused is ultimately convicted. Such a system places considerable emphasis on the charging decision. The Commission determined that a pure conviction charge system would inaccurately portray the offender to the judge and restrict the judge's ability to consider relevant sentencing evidence beyond the offense of conviction.⁶⁴

The Commission also decided that a second prominent punishment system, a real offense system, would not satisfy congressional goals. A judge in sentencing under a real offense system looks at all of the relevant factors associated with the acts of misconduct for that particular accused for those

particular acts that are charged. A pure real offense system would expose the offender to attack on irrelevant or highly questionable allegations while creating a possible due process violation.⁶⁵

In the end, the Commission compromised the two systems by tying the guideline category and the base offense level to the conviction charge. The base offense level was then subject to modification dependant on the real offense factors.⁶⁶ In explaining its decision, the Commission noted that in any sentencing system the pure application of either system is untenable.⁶⁷

From empirical study and analysis of 10,000 pre-guideline cases, the Commission determined an average base offense level for each violation within 19 generic offense categories. The base offense level was adjusted to reflect the sentencing purposes and the punishment system. The intersection of the base offense level and the criminal history category provided the sentencing range. The Commission never intended for this sentencing range, dubbed the "heartland," to reflect the appropriate or ideal sentence, but merely to serve as a starting point from which a judge could determine if adjustments should be made and to what extent.⁶⁸

By including seven members with divergent backgrounds and expertise in the Commission, Congress intended to have the Commissioner's debate and resolve issues to best accomplish Congressional goals of the Sentencing Reform Act. In tackling

the issue of disparity,⁶⁹ the Commission relied on the experience of its members to strike a suitable balance between uniformity in sentencing and proportionality between offenders and offenses.

The Commission recognized that making sentences all the same, too uniform, was just as distasteful as making guidelines too proportional. In the end the Commission opted to make the Guidelines as simple as possible while including the significant sentence modifiers derived from past sentencing practices. When deciding to place a greater emphasis on uniformity than proportionality, the Commission realized that excessive uniformity, prosecutorial abuse, and errant judicial departures⁷⁰ could undermine its attempt to control disparity.

3. Testing the Guidelines

Between November 1, 1987, and January 18, 1989, chaos engulfed the federal criminal justice system. Federal courts were hearing pre-guideline and post-guideline cases without understanding how to apply the Guidelines.⁷¹ With little or no advance training, practitioners at all levels were adrift in a sea of complex rules and foreign concepts. Undermanned and not fully prepared for the influx of Guidelines questions from practitioners, the Commission was of little help. As the Commission realized the magnitude of the problems in the field, it exercised some of its statutory power to increase its staff dramatically to handle questions from the field and vigorously pursued an intensive training program.⁷²

No one anticipated the tremendous impact the implementation of the Guidelines would have on the federal court system until almost too late. The courts exacerbated the problem by permitting attacks on the Sentencing Reform Act on a plethora of constitutional grounds. Before the dust was settled "over 200 district judges held the Sentencing Reform Act was unconstitutional, while some 120 judges would rule the opposite."⁷³ The court system was in disarray and the critics were having a field day.

Granting an expedited appeal due to the severity of the problem among the circuits, the Supreme Court in *Mistretta v. United States* upheld the Sentencing Reform Act.⁷⁴ After hearing extensive arguments, the Court held that Congress' delegation of authority to the Commission was not excessive since Congress provided explicit ground rules for all facets of the Commission's task.⁷⁵ With equal force, the Court held that the Constitution does not prohibit Congress from locating the Commission within the Judicial Branch,⁷⁶ having Article III judges serve extra-judicial duties,⁷⁷ and empowering the President to appoint Commission members, including the three federal judges.⁷⁸ In summation, the Court stated that while "an unusual hybrid in structure and authority," the Commission as created by Congress was legal.⁷⁹ That imprimatur by the Court resolved the basic underlying issues, but did nothing to squelch the criticism and misapplication of the Guidelines.

The only issue the Court did not address in *Mistretta* which surfaced in later cases involved due process. Uniformly, all the circuits⁸⁰ rejected the argument that the Guidelines violate due process. The underlying basis for the circuit courts' decisions resulted from an extension of the rationale articulated by the Supreme Court in *Mistretta* decision. The circuit judges argued that since the Supreme Court upheld the constitutionality of the delegation of powers to the Commission, and the Commission was acting within its authority when it promulgated the Guidelines, then the Guidelines provided sufficient due process protection.

C. GUIDELINES APPLICATION

The heart and soul of the Guidelines, the sentencing table, consists of 43 offense levels (vertical axis) and 6 criminal history categories (horizontal axis). The table provides the sentencing range for the offender where the two axis meet. The judge is free to award any punishment within that range. If he goes outside of the range, he must specifically state his reasons for departing.⁸¹ Section 1B1.1 of the Guidelines provides detailed instructions on how to apply the Guidelines. To the consternation of some, the procedure to use the Guidelines seems very mechanical:

- 1) determine offense guideline section
- 2) determine base offense level and apply offense characteristics
- 3) apply Chapter Three adjustments (up or down)

- 4) for multiple counts, repeat steps (1) through (3), then group the various counts and adjust offense level
- 5) apply acceptance of responsibility adjustment
- 6) determine criminal history category from Chapter Four
- 7) determine guideline range
- 8) review Parts B through G of Chapter Five as to authorized punishments
- 9) consider Chapter 5 offender characteristics and departures⁸²

In applying the guidelines, the judge walks through the Guidelines starting from Appendix A, the statutory index, to Chapters Two through Five sequentially. A system that appears very rigid and mechanical on the surface, upon closer inspection and use reveals considerable flexibility.⁸³ The resultant Guidelines were another compromise by the Commission to try to abide by Congress' desire for rigid sentencing guidance while recognizing the need for flexibility.⁸⁴

Determination of the base offense levels results from subjective interpretation of the facts of the case. The criminal history category correlates with the amount of background information obtained from investigations, prosecution files, and the accused. Departures provide additional flexibility in the application of the Guidelines to permit correction of the sentencing range for exceptional cases.

D. EVALUATING THE GUIDELINES

1. Case Law

Though not included in the Guidelines or the Commission's mandate, Congress provided for automatic right of appeal of sentences by either the government or the defendant.⁸⁵ Prior appellate case law rarely involved sentencing because the circuit courts had very little to review. Appellate courts recognized the unique fact-finding atmosphere of the sentencing hearing and were extremely reluctant to substitute their judgment for the district judge.⁸⁶

As a result of the Sentencing Reform Act, appeals rose from 3% in 1988 to 64.9% in 1991.⁸⁷ Government counsel could appeal unreasonable downward departures and defendants could appeal unreasonable upward departures. As a result of the dramatic increase in cases appealed, a substantial amount of appellate case law interpreting the Guidelines exists. Discussion and analysis of the emerging case law exceeds the parameters of this thesis. The BNA Criminal Practice Manual and a case analysis published by the Federal Judicial Center discuss recent Guideline developments.⁸⁸

2. Legal Commentary

Besides case law, legal commentary abounds regarding the Guidelines. The computer services, LEXIS and WestLaw,⁸⁹ created separate libraries dedicated solely to Guidelines cases and materials. In reading the commentaries, two sides emerge from the writings; those either substantially for or vigorously

against the Guidelines. An occasional article emerges from the middle ground to articulate a point or position, but the most vocal are the extremists. As pointed out by Professor Tonry, the members of the two groups appear to have no affiliation other than their like or dislike of the Guidelines.⁹⁰

All commentators agree that the Guidelines need some revision if they are going to work as Congress intended. However, no one knows for certain what Congress intended because Congress has provided no guidance since passing the Sentencing Reform Act.⁹¹ By its silence, Congress seems satisfied with the way the Guidelines are working and the Commissions' interpretations.

3. The Commission Report

In the Sentencing Reform Act, Congress directed that the Commission monitor the operation of the Guidelines and modify them as needed. Issued January 1992, the Commission's four-year report comprises three volumes. The first volume is an 85 page Executive Summary of the other two volumes, 423 pages of research findings and analysis. The Commission's study encompassed four areas: implementation of the Guidelines, impact on sentencing disparity, use of incarceration, and prosecutorial discretion and plea bargaining.⁹²

The Commission reports that implementation of the Guidelines is "moving steadily forward, albeit not without occasional difficulties and unevenness among jurisdictions, but with clear indications of increasing acceptance and success."⁹³ That

conclusion, however, fails to adequately represent the depth of criticism from some jurisdictions or legal scholars. The survey results showed a distinct split between most of the survey answers. District judges, probation officers, and United States attorneys fell on one side and defense attorneys on the other side. The Commission concluded from its survey of 258 judges, attorneys, probation officers, clerks of court, and 1802 mail samples (2998 samples were sent for a completion rate of 60%) that judges, prosecutors, and probation officers generally support the Guidelines with some disagreement about policy decisions. Most defense attorneys did not support Guidelines because Guidelines sentencing was too harsh.⁹⁴

In studying disparity the Commission examined four offenses: bank robbery, cocaine distribution, heroin distribution, and bank embezzlement. The Commission reviewed data from about 6,000 pre-guidelines and post-guidelines cases to statistically analyze whether the Guidelines reduced disparity. Because Congress provided for an acceptable sentencing range, the Commission only looked outside of the range in determining disparity.⁹⁵

Of the offenses studied during the case sample period resulting in a sentence of some type, July 1984 to June 1990, the number of cases increased 69%. This increase began prior to the Anti-Drug Abuse Act of 1986 and implementation of the Guidelines.⁹⁶ Some of this increase must be attributed to Guideline implementation of the Guidelines. With other laws such as the Anti-Drug Abuse Act of 1986 affecting sentencing

decisions, the proportional allocation of the increase is impossible to determine.

Prison sentences for the case offenses follow the same pattern of increase, with the greatest overall increase appearing in the drug offenses. The overall rate of imprisonment for the four offenses increased from 52% to 65%. Imprisonment for drug offenses increased from 72% to 87%, correlating with the implementation of the Guidelines and a second drug act, the Anti-Drug Abuse Act of 1988. The *Mistretta* decision pinpoints the upswing on imprisonment for robbery and economic offenses. Imprisonment for robbery increased from 84 to 99% while terms of prison for economic crimes increased from 39 to 51%.⁹⁷ Not only did the Guidelines affect the rate of imprisonment, Guidelines implementation also impacted on length of confinement for the four offense groups.

The study showed that actual prison length increased due to the Anti-Drug Abuse Act of 1986, implementation of the Guidelines, and the *Mistretta* decision. Two measurements were done: one without probation, the other with probation included.⁹⁸ In each measurement the sentence length for all offenses roughly doubled.

The study showed significant increases in both use of incarcerative sentences and the average length of prison sentences. Though Congress did not mandate that the Commission coordinate the effect of Guidelines on prison population,⁹⁹ as Minnesota did in its guideline structure,¹⁰⁰ Congress did require

the Commission to consider impact and prison alternatives. Commissioner Nagel contends that the Commission considered prison impact, but refused to alter necessary sentence changes solely due to prison population.¹⁰¹

According to the Commission, plea practices impact on approximately 17% of cases, with 14% directly affecting the sentence imposed. Due to lack of data and any effective way to measure, the Commission could not determine how judicial decisions influenced plea bargaining.¹⁰²

After reviewing all of the data, the Commission concluded that the Guidelines create uniformity and reduce disparity. It also concluded that the Guidelines produced truth in sentencing. In responding to Congress' mandate to comment on problem areas, the Commission noted that some judges and prosecutors are attempting to circumvent the Guidelines through pre-charging decisions and departures, that mandatory minimums conflicted with congressional sentencing goals, and that all personnel required more training in all areas of Guideline use.¹⁰³

4. The GAO Report

To find out how the Guidelines were working, Congress directed GAO to evaluate the Guidelines four years after implementation. The GAO report to Congress was to be based on the Commission's four year report and on GAO's independent study and evaluation. Congress told GAO "to evaluate the impact of the guidelines and compare the operation of the new system with the

old."¹⁰⁴ Using its own survey as well as the Commission's survey results, GAO evaluated four areas of Guideline operation:

- [1] whether or not the guidelines reduced the variation in sentences imposed and time served by groups of offenders who committed similar crimes and who had similar criminal histories, and whether the average time served for such similar groups of offenders increased or decreased;
- [2] how the guidelines sentences related to offense characteristics, such as severity of the offense, and to offender characteristics, such as race;
- [3] the perceptions of judges, prosecutors, defense attorneys, and probation officers regarding the benefits, problems, and long-range effects of the sentencing guidelines; [and]
- [4] the impact of the guidelines on the operations of the federal criminal justice system. Our work focused on how the guidelines affected the workload and budget and case processing times of the courts and investigative agencies.¹⁰⁵

In analyzing disparity, GAO used the sentencing data from the Commission, but a different methodology. GAO believed that by looking at sentences within the range for a particular offense level as well as those falling outside the range, a more accurate evaluation of disparity would result. From its evaluation, GAO determined that unwarranted disparity continued, but that the

Guidelines reduced overall disparity. Specifically, GAO concurred with the Commission's finding that disparity decreased in bank robbery, bank embezzlement, heroin distribution, and cocaine distribution cases. GAO noted that pre-guidelines disparity was impossible to determine due to lack of data.¹⁰⁶

GAO determined that charging and plea bargaining decisions can create disparity, but the data was inadequate to determine to what extent they caused disparity. GAO interviews and the Commission's studies indicated that both the prosecutor during the charging process and the judge in reviewing the plea agreements possess the potential to cause disparate sentencing.¹⁰⁷

In evaluating impact on workload, GAO found that the new elements in the Guidelines caused increased workload for all parties, especially judges, prosecutors, defense counsel, and probation officers. Other aspects of pre-guidelines cases such as the sentencing hearing also took longer due to the procedural requirements of the Guidelines.¹⁰⁸

Cases going to trial, not including guilty plea cases, remained stable at about 14% with no appreciable increase in the average trial time. From 1986 to 1990 processing of cases from indictment to conviction increased from 3.2 to 4.5 months and from conviction to sentencing increased from 41 to 69 days.¹⁰⁹

GAO concluded that the time period for adequate evaluation was too short and the available data insufficient.¹¹⁰ Debate regarding the Guidelines, GAO found, centered on two arguments. Those supporting the Guidelines cited the consistency and

predictability in sentencing. Critics argued that sentencing was too harsh and rigid, that Guidelines removed too much judicial discretion, and, for some judges and defense attorneys who GAO interviewed, ignored hidden disparity created by charging decisions and plea bargains.¹¹¹

5. The ABA Survey

Because of the turmoil within the federal justice system caused by the Guidelines, and the Commission's lack of response to changes suggested by the ABA, the ABA conducted a survey among federal court practitioners. In analyzing workload, the ABA concluded that more cases were going to trial because of mandatory minimums and the Guidelines. The survey indicated that the number of trial cases increased from 11% to 33% since implementation of the Guidelines. The survey also found that more time was required to process criminal cases under the Guidelines for several reasons: time increased for plea bargaining due to more issues, calculating the levels, and unprepared or uneducated defense attorneys. Presentence report took longer to complete due to client preparation, objections, investigation, and hearings. The vast majority of district judges responded that it took up to one hour for an average sentencing hearing and 74% responded that it required up to one hour to write up their findings.¹¹²

A significant number of plea agreements involve cooperation agreements. Because of the large number of cases handled by United States Attorneys compared to most defense attorneys, some

responses differ significantly due to experience. For example, 58% of United States Attorneys responded they agree to file motions for departures due to the substantial assistance of the accused, section 5K1.1 departures, no more than 5% of the time. To the same question 52% of the defense attorneys said the government agrees to section 5K1.1 departures more than 50% of the time. District judges responded that even when the government moves for a section 5K1.1 departure, they sometimes refuse to depart.¹¹³

When asked if the Guidelines are working, United States attorneys and circuit judges said "yes" and defense attorneys and district judges said "no".¹¹⁴ All parties surveyed agreed that everyone required more training and that the probation officers were generally the most knowledgeable about the Guidelines.¹¹⁵ The survey responses indicated that district judges relied heavily on presentence report recommendations¹¹⁶ and that United States Attorneys often did not review the Guideline worksheet with the probation officer.¹¹⁷

A clear conclusion from the survey was that all parties require more training in Guidelines application. Additionally, the survey supports the Commission report and GAO report in the advantages and disadvantages of the Guidelines. The survey, however, illustrates the split between Guideline supporters and Guideline critics. Accurate interpretation of the ABA data is difficult without knowing the districts where the respondents practice and their predisposition regarding the Guidelines.¹¹⁸

III. SENTENCING IN THE MILITARY JUSTICE SYSTEM

It [the UCMJ] is more than a criminal code: it represents a fundamental pact between the public and the armed forces as to the basic rules that establish the unique features of military service.

*William H. Taft IV, OGC of the Dept. of Defense*¹¹⁹

A. LEGISLATIVE HISTORY

Although remnants of earlier military codes remain, the changes affected by Congress after World War II control much of today's military justice system. Prior to enactment of the Military Justice Act (MJA) of 1950¹²⁰ and the creation of the 1951 Manual for Courts-Martial,¹²¹ each service had its own independent justice system. The criminal codes with which each service administered its military justice system differed due to operational requirements and service autonomy.

Because of the large number of servicemembers from each service co-located in WWII and the "outcry which arose" at the end of World War II, Secretary of War Patterson appointed a special clemency board to review GCM. Due to the board's review, the Secretary of War remitted or reduced 85% of the sentences.¹²² The differences in military justice systems became topics of concern when Congress was looking at the reorganization of the services. Congress believed that no matter the uniform, individuals who were fighting and dying for their country should be protected by the rights and freedoms protecting the ordinary

citizen. Additionally, those rights and freedoms should apply equally regardless of the branch of service.

In 1950, with the creation of the Uniform Code of Military Justice (UCMJ), Congress merged the separate disciplinary codes of the military branches into one code.¹²³ For the first time, a soldier and a sailor were subject to the same disciplinary code and received equal procedural protection. In 1950, the disciplinary action of convening authorities became subject to review by a service's Board of Review¹²⁴ and the Court of Military Appeals.¹²⁵ For the first time, civilians, the three members of the Court of Military Appeals, would review court-martial decisions.

Prior to 1950, courts-martial in the military were fact gathering hearings with little emphasis or concern for the law or more specifically due process. Beginning with 1950, Congress attempted to correct the problem. Unfortunately sentencing practice in the military has suffered the most from these concerns, by adopting a more restrictive approach to due process during sentencing proceedings than the federal courts. Based largely on a sentencing scheme derived from the MJA of 1950, sentencers in modern courts-martial make uninformed, inconsistent sentencing decisions.¹²⁶ This section explains the evolution of those parts of the sentencing system pertinent to adoption of a military guideline system.

1. The First Uniform Code of Military Justice

In 1946, the Secretary of Defense ordered that the services combine their disciplinary rules and procedures into a disciplinary system uniformly applicable to all servicemembers.¹²⁷ Four years of debate, studies, and intermediate bills culminated on May 5, 1950, with enactment of the MJA of 1950. Driven by two primary concerns, unlawful command influence and unjust treatment of servicemembers, Congress ensured that the UCMJ, controlled the impact of the convening authority on the judicial process, and provided for much greater procedural protection for servicemembers standing courts-martial. The majority of the UCMJ came from the Articles of War, although the Articles for the Government of the Navy, both current and proposed, were incorporated where appropriate.

Comprised of 140 articles, the UCMJ provided for uniformity while attempting to maintain consistency. Articles 16-20 created uniformity in the vehicles used to administer punishment, courts-martial. Previously the Army and the Navy had three levels of courts-martial, but court-martial names and procedures differed.¹²⁸ Under the MJA of 1950 each service had a summary, special, and general court-martial, for disciplining minor, intermediate, and major offenders.

Under the changes directly affecting the accused, Article 46, offering equal opportunity to obtain witnesses, directed the President to draft a regulation detailing the procedural requirements.¹²⁹ Articles 55-58 pertained to sentencing, but did

not include procedural requirements. Under Article 56, the President could prescribe maximum punishment except when Congress prescribed mandatory punishment. Article 57 made sentences to confinement effective when adjudged, but forfeitures and fines only became due upon initial approval by the convening authority. Confinement could be in any military or federal prison facility.¹³⁰ Congress explained that Article 58 allowed prisoners with "long civilian criminal records, criminal psychopaths, sex deviates, violent incorrigibles, and other prisoners requiring special treatment" the opportunity to go to federal facilities which provide specialized treatment meeting their needs.¹³¹

Review of courts-martial began with the convening authority who could affirm the findings and sentence,¹³² but for GCMs the convening authority could only act after receiving the written review and advice of the staff judge advocate.¹³³

Under Article 65, the SJA forwarded his opinion and the record of trial to the appropriate judge advocate general, who sent the case to the Board of Review. Three senior judge advocates or civilian attorneys comprise the Board of Review. They reviewed all cases involving death, dismissal, a dishonorable or a bad conduct discharge, a general officer, or confinement greater than one year.¹³⁴ The automatic review was the same as under previous military law except for the extension of automatic review to confinement. Congress included the automatic review of confinement of one year or more to account for the transfer of military prisoners to federal prisons which

offered rehabilitation programs. A Board of Review could dismiss, order a rehearing, or reduce a sentence to conform with its review of matters of law and fact contained in the record of trial.¹³⁵

Article 67 created an entirely new review court not previously contained in military law, the Court of Military Appeals. Made up of three civilian judges who only for administrative purposes were located within the Department of Defense, Court of Military Appeals function was to act as the supreme court of military law.¹³⁶ However, to appease military commanders, the jurisdiction of the Court of Military Appeals encompassed only matters of law. Congress limited Court of Military Appeals's corrective authority to ordering a rehearing or dismissing the charges where error is found. Court of Military Appeals could not modify or reassess the sentence approved by the convening authority. Court of Military Appeals could also hear issues raised by the Judge Advocate General or review any case requiring presidential approval.¹³⁷

To incorporate civilian common law crimes and the concepts of principals, accessory after the fact, lesser included offense, attempts, conspiracy, and solicitation, Congress created Articles 78-81. Congress made other changes to the punitive articles for uniformity and conformance with applicable federal statutory definitions.¹³⁸

Even as far as the UCMJ went in providing increased protection against unlawful command influence and unjust judicial

proceedings, public interest groups called for greater reform. Mr. George A. Spiegelberg, in testifying for the ABA, argued that charging authority should be taken from the convening authority and given to the JAG to help eliminate unlawful command influence.¹³⁹ The Subcommittee when debating the issue balanced the military's need for discipline with the servicemember's right for justice. In response to Mr. Spiegelberg's comments, Senator Wayne Morse, observed:

If we are going to handle this court-martial business, I say, let us do a thorough job...and make changes wherever we can make a change that will bring the military system in direct line with civilian justice and...not interfere with what we can all agree is necessary military organization in order to have an effective fighting force.¹⁴⁰

2. Sentencing Procedures under the 1951 Manual

Over the course of present military law, Congress, the President, and Court of Military Appeals, in line with Senator Morse's concerns, have attempted to balance military justice and military discipline. With the promulgation of Executive Order 10214 on February 8, 1951, the President implemented Congress' desires and intents in passing the MJA of 1950.¹⁴¹

The 1951 Manual for Courts-Martial provided for a separate hearing on sentencing, but the members relied largely on evidence presented during the merits. The presentencing proceeding was adversarial in nature; the defense could object to prior

conviction evidence and could conduct cross examination. The government could offer evidence of previous unrelated military convictions by introducing the service record book, but prior convictions were restricted to the same term of enlistment or three years. Objections were simply noted for the record by the law officer. However, the law officer only presided at general courts-martial, inferior courts-martial had only members or a single member.¹⁴²

In determining the sentence, members could refer to the Manual for Courts-Martial for sentencing guidance or seek the advice of the law officer. Because Congress desired uniformity in sentencing, after endless accounts of disparate sentences among servicemembers, the UCMJ reflected a desire for uniformity. Upon considering the Manual for Courts-Martial, members were instructed to bear in mind sentences adjudged for similar conduct.¹⁴³ The new Manual for Courts-Martial authorized the law officer to provide the members with the sentencing results from similar cases. Article 76 also instructed the members to consider local needs and the adverse impact on the military's reputation if civilians should view the sentence as too light.¹⁴⁴ In this way, Congress attempted to counterpoise justice and discipline.

Either the defense or the members could submit post-trial clemency matters, not subject to the rules of evidence, for the convening authority's consideration. After reviewing the clemency matters, the SJA review, and considering the

requirements of Articles 48 and 76 to approve an appropriate sentence based on all known factors, the convening authority would act on the sentence.¹⁴⁵

If the approved sentence activated the rules for automatic review, then the case was forwarded to Board of Review.¹⁴⁶ The Board of Review and the Court of Military Appeals assumed the role in the sentencing process of referee and arbiter: to define what constitutes a sentencing hearing, keep the players within the boundaries, and on occasion, take control of the game.

3. The Early Years of Court of Military Appeals

Within the first few years of the UCMJ, the Court of Military Appeals quickly exerted its role as referee. In *United States v. Rinehart*,¹⁴⁷ the Court of Military Appeals held that members could not review the Manual for Courts-Martial when determining an appropriate sentence. Additionally, the Court of Military Appeals prohibited the law officer from providing sentence results from other cases to the members.¹⁴⁸ Two years later, the Court of Military Appeals further modified Article 76 in *United States v. Mamaluy*.¹⁴⁹ The Court of Military Appeals held that court must individualize sentences, nullifying the deterrent language of Article 76.¹⁵⁰ What took the military years to develop became a nullity in the hands of the novice court.

As argued by Colonel Frederick Wiener, the principal purposes for sentencing for civil courts and military courts differ to such an extent that the Court of Military Appeals should not be created. He argued that because civilian law has

reform as its object, civilian judges who were trained to support reform would detrimentally impact on discipline.¹⁵¹ Civilian judges appointed to review military court-martial would not understand the purpose for the military's rigid rules and harsh punishment. Congress failed to heed his advice and created the Court of Military Appeals. Once created, the Court of Military Appeals seemed bent on inducing prison reformation into the military justice system. As proven by the federal system, reformation should only be considered, and usually is only considered, after the offender is sent to prison.

Evidentiary decisions by the Court of Military Appeals conflicted with the Court of Military Appeals' espoused ideal of individualizing sentencing in the military. In *United States v. Billingsley*,¹⁵² the board held that asking a witness if he wanted the accused to work for him again was improper. Then, in *United States v. Pendergrass*¹⁵³ and *United States v. Averette*,¹⁵⁴ the Court of Military Appeals ruled that evidence of uncharged misconduct whether from the prosecution or the defense, was inadmissible. In *Averette*, Chief Judge Quinn in his dissent argued that such evidence was relevant and admissible for determining an appropriate punishment.¹⁵⁵ In *United States v. Vogel*,¹⁵⁶ the Court of Military Appeals required the legal officer to instruct the members to disregard the unchanged misconduct evidence, *sua sponte*, even if the defense introduced the evidence.¹⁵⁷ The court's decision to inhibit the members from

making an informed sentencing decision also extended to prior convictions.

Since 1921, military sentencing procedures allowed trial counsel to proffer evidence of prior convictions if defense did not object, but the Court of Military Appeals stopped that practice by requiring documentation comporting with the rules of evidence.¹⁵⁸ In *United States v. Clark*¹⁵⁹ the defense counsel attempted to introduce the underlying basis for conviction to obtain member sympathy. Whether done by defense or prosecution, the Court of Military Appeals said such questioning was improper.¹⁶⁰ The court continued its confusing position by limiting the extenuating and mitigating evidence members could consider during sentencing.

Use of evidence in extenuation and mitigation, to include opinion evidence, which should provide significant information when individualizing sentences, evolved into a tactical battle. Instead of the members hearing all relevant information, they only heard what the defense wanted them to hear. In 1962, the Army Board of Review ruled that members determine the accused's punishment, so the opinion of witnesses as to appropriate sentencing options was irrelevant.¹⁶¹ If the defense, however, wanted to introduce evidence that the witness wanted the accused to work for him again, the Court of Military Appeals said that was proper.¹⁶² The Court of Military Appeals was beginning to let the defense control the courtroom during the presentencing portion of the court-martial.

The tactical decision by defense counsel to withhold extenuation and mitigation evidence was upheld by the Court of Military Appeals, even though in *United States v. Allen*¹⁶³ the Court of Military Appeals held that a defense counsel who failed to introduce extenuation and mitigation evidence risked a finding of ineffective assistance. *United States v. Williams*,¹⁶⁴ demonstrated the intent of the Court of Military Appeals to protect the accused, even when trial tactics precluded relevant evidence from the member's consideration during sentencing.

Initially the Court of Military Appeals, in *United States v. Blau*, followed the Manual for Courts-Martial and allowed all relevant and reliable rebuttal evidence to be introduced through relaxed rules of evidence.¹⁶⁵ However, the holding in *Blau* did not stand very long. In a clarifying opinion, in *United States v. Anderson*,¹⁶⁶ the Court of Military Appeals held that hearsay evidence, including documents, was not admissible even under relaxed rules of evidence. "Military due process" required the accused be allowed to confront the witnesses. Under the Court of Military Appeals relevancy and reliability became almost immaterial standards if the defense did not want the evidence considered.

Today's military trial attorneys often take argument during sentencing for granted, but argument was not authorized by regulation or law until the Air Force Board of Review ruled that argument was a logical extension of the adversarial nature of presentence hearings.¹⁶⁷ In *United States v. Olson*,¹⁶⁸ the Court

of Military Appeals agreed to allow argument even though the Manual for Courts-Martial was silent on the matter.

Rationalizing its decision, the Court of Military Appeals reasoned that in an adversarial setting, such as sentencing, members should hear counsel's explanation of the evidence.¹⁶⁹ Probably due to concern that members could not understand evidentiary and legal matters, the court compromised informed sentencing.

As with evidentiary rulings, argument during sentencing made no sense in determining an individualized sentence. Argument according to Black's Law Dictionary is "an attempt to establish belief by a course of reasoning."¹⁷⁰ Argument of counsel strives to persuade members to adopt counsel's interpretation of the facts. Instead of receiving a sentence based on the evidence, the accused received a sentence dependent upon counsels' orations.

Under Article 61,¹⁷¹ the SJA is required to review all GCM records and provide his opinion to the convening authority, who will then review and act on the record. Military courts originally provided that the information in the SJA's review and the clemency report should include personal characteristics and results of an interview, after rights advisement, of the accused. The information provided to the convening authority is strikingly similar to the information probation officers included in a pre-guidelines presentencing report.¹⁷² As long as it was after trial, the Court of Military Appeals seemed willing to let the

convening authority hear a wide variety of information.¹⁷³ None of the boards of review believed that self-incrimination warnings were required prior to a post-trial interview of the accused; however, the Air Force provided a warning anyway.¹⁷⁴

Prior to *United States v. Sarlouis*¹⁷⁵ the accused had no right to a copy of the SJA's opinion. In *Sarlouis*, the court held that the only way to stop the Convening Authority from considering inaccurate information in SJA opinions was to provide a copy to the accused.¹⁷⁶ The Court of Military Appeals, however, did not make service on the accused mandatory until 1975. Under the new UCMJ and the 1951 Manual for Courts-Martial, sentencing practice was haphazard. In attempting to establish case law, the Court of Military Appeals forgot or refused to look at federal precedent. Some of the over-reaction which generated congressional micromanagement of the military justice system, surfaced in the Court of Military Appeals. During this period, the Court of Military Appeals seemed intent on proving Colonel Wiener correct; that civilian judges could not understand the balance between discipline and justice. During the *Vietnam Era*, the President and Congress attempted to overcome some of the Court of Military Appeals rulings. The Court of Military Appeals, however, continued to place restrictions on the information provided to the sentencer.

B. CHANGES DURING THE VIETNAM ERA

1. A Revised Uniform Code of Military Justice

The decisions of the Court of Military Appeals greatly complicated the law officer's job. Ultimately, this complexity led to the demise of the law officer. According to Major General Hodson, the Judge Advocate General (JAG) of the Army, the rulings of the Court of Military Appeals forced the military to ask for replacement of the law officers with military judges.¹⁷⁷ Complex legal decisions, expanded procedural protection, and the advent of certified trial and defense counsel, made the law officer's job a nightmare. The military justice system required judge advocates completely and solely dedicated to the study of military criminal law. Training and certifying some judge advocates as judges seemed the appropriate solution.

The MJA of 1968 paralleled the language of rule 23(a) of the Federal Rules of Criminal Procedure¹⁷⁸ in creating "military judges" and affording the accused the right to trial by military judge alone.¹⁷⁹ Military judges would preside at GCM and SPCM and hear cases alone or rule on questions of law where members are present. Requests for trial by military judge alone were unauthorized in cases where the death penalty was possible.¹⁸⁰

When acting as a one member SPCM or GCM, the military judge decides questions of fact and of law and adjudges an appropriate sentence.¹⁸¹ Judge Homer Ferguson in his statement to the committee on House Report 12705 said¹⁸² that the majority of military cases were guilty pleas. In civilian courts he asserted

that guilty pleas are normally heard by judge alone.¹⁸³ As a result, courts-martial should be more efficient if military accused followed civilian practice of electing trial by judge alone in guilty plea cases.

To conform with the new role of the law officer as a military judge, Article 39 was amended to resemble Rule 12 Federal Rule of Criminal Procedure and federal district court practice.¹⁸⁴ Court sessions outside the presence of the members to rule on evidentiary matters or other issues not suitable for the members consideration resulted.¹⁸⁵ Congress enacted the MJA of 1968 so that courts-martial more closely paralleled federal district court practices and made the law officer comparable to a civilian district court judge.¹⁸⁶

All changes enacted in the MJA of 1968 additionally focused on creating more respect for the military justice system. "Courts of Military Review", "military judges", and rules paralleling Federal Rule of Criminal Procedure were concepts and names familiar to civilians and servicemembers.¹⁸⁷ The words created images of a professional legal system; the resulting procedures created a roadblock to informed sentencing.

2. The 1969 Manual

To implement the changes introduced by enactment of the MJA of 1968 as well as changes resulting from case law, the President revised the Manual for Courts-Martial of 1950. The new Manual for Courts-Martial, effective August 1, 1969,¹⁸⁸ provided changes to sentencing procedures, but the basic sentencing concepts and

the format for presenting hearings remained the same. Paragraph 75 had two substantial changes regarding evidentiary matters for sentencing.

Prior convictions were no longer limited to three years and the current enlistment. The President extended the window for admissibility to six years and withdrew the requirement that the convictions must have occurred during the current enlistment.¹⁸⁹ Second, the government could introduce personnel records in sentencing if they conformed to applicable regulations and were relevant.¹⁹⁰ These changes increased the amount of information available during sentencing to allow for individualized sentencing.

The President also authorized procedures where the sentencing authority could consider evidence of uncharged misconduct.¹⁹¹ As with the other sentencing changes, the President authorized this change so that the sentencing authorities at the trial and post-trial level could make informed sentencing decisions. The Court of Military Appeals supported the President's authority to make the change even though prior military case law held otherwise.¹⁹²

3. Appellate Court Reaction to Congress and the President

After enactment of the MJA of 1968, the Court of Military Appeals decided *United States v. Booker*,¹⁹³ effectively overturning a prior Court of Military Appeals ruling in *United States v. Johnson*.¹⁹⁴ *Booker* held that an uncounseled nonjudicial punishment or summary court-martial results were inadmissible

unless the accused saw legal counsel prior to accepting action at that level. The court's ruling focused on the military accused's due process rights during sentencing. Neither NJP nor SCM provided the same procedural safeguards afforded an accused facing criminal prosecution; therefore, the court ruled that the waiver of counsel must be in writing and knowing.¹⁹⁵

As could be expected all of the services were unhappy with this decision. *Booker* meant tying up legal resources just so the sentencer could consider the evidence of prior SCMs to enhance the punishment. For minor offenses, commanders had to delay proceedings until the accused saw defense counsel. Additionally, defense counsel had to adjust for the increase in workload resulting from these counselings. *Unites States v. Mathews*¹⁹⁶ extended the Court of Military Appeals's prohibition to include results of NJP. The ruling in *Booker*, as extended in *Mathews*, advanced no discernible sentencing theory.

In *Middendorf v. Henry*, the Supreme Court held that SCM were not criminal proceedings and did not require counsel's presence.¹⁹⁷ The Court of Military Appeals' posture on the issue, ignores the non-criminal aspect identified by the Supreme Court. As suggested by one author, the Court of Military Appeals appears to have manipulated the military justice system to conform with their ideals of justice; sending the military a message to get rid of NJPs and SCMs, or provide greater due process protection.¹⁹⁸

The court continued to ostracize general deterrence from the courtroom¹⁹⁹ and post-trial consideration.²⁰⁰ The Army Court of Military Review believed that *United States v. Mosely* was bad law, that punishment is a general deterrent and criminal activity, whether civilian or military, impacts on society. The Army court reasoned that since all crime impacts on society and all crimes must be punished, general deterrence was a valid sentencing purpose.²⁰¹ The Court of Military Appeals eventually did agree with the Army court, but not until 1978.²⁰²

The Court of Military Appeals also cleared up any confusion regarding the right to counsel in post-trial interviews. Contrary to federal precedent, the Court of Military Appeals held that the post-trial interview was a critical stage that required counsel's presence during the interview.²⁰³ This ruling does not support the court's footnote proposing that the military should use presentence reports.²⁰⁴ The federal courts require presentence reports; however, the federal courts do not require counsel's presence during the presentence interview, only prior to the interview.²⁰⁵

To further hamper an individualized sentence, the Court of Military Appeals differentiated between the SJA review and the clemency report to the convening authority.²⁰⁶ The Court of Military Appeals held that the SJA in his review could not include information excluded at the trial.²⁰⁷ Then the Court of Military Appeals extended this rationale further by ruling that error resulted when information favorable to the accused was not

included, even when done unintentionally.²⁰⁸ To ensure that the accused was aware of the contents of the SJA review the court made service of the SJA review on the accused mandatory.²⁰⁹ Though articulating a desire to incorporate some federal procedures, the court showed little interest in taking the lead by fashioning case law reflecting informed sentencing. Perhaps the court's strict enforcement policy was another attempt to create change by showing the inadequacy of the UCMJ and Manual for Courts-Martial in sentencing an accused.²¹⁰

4. A New Leader at the Helm

In 1980, the Court of Military Appeals changed leadership, Judge Everett replaced Judge Fletcher as Chief Judge.²¹¹ With Chief Judge Everett at the helm, the Court of Military Appeals continued to send mixed signals in sentencing matters. In *United States v. Lania*,²¹² the court ruled that an argument referring to general deterrence as a sentencing purpose was permissible as long as deterrence was not presented as the sole basis for the sentence. The court refused to isolate a single sentencing purpose, but emphasized individualization. The court also ruled that counsel could comment on the accused's mendacity when arguing and that the sentencer could consider mendacity in arriving at an appropriate sentence. In *United States v. Warren*, the Court of Military Appeals held that narrower construction must be placed on the consideration of mendacity by military courts due to weaknesses within the military justice system.²¹³

The Court of Military Appeals did not have faith in the ability of members to provide the appropriate weight to such an argument.

To enhance its decisions on argument issues, the Court of Military Appeals expanded introduction of some presentencing evidentiary matters.²¹⁴ In return, the Court of Military Appeals provided the accused greater protection against rebuttal evidence. Though allowing the use of unauthorized evidence in rebuttal previously ruled inadmissible on the merits, the Court of Military Appeals precluded other specific types of rebuttal evidence from use.²¹⁵ The Court of Military Appeals even restricted evidence properly placed in personnel records when the purpose of entry was to enhance punishment.²¹⁶ Continuing to castigate the military for its use of members in sentencing, the Court of Military Appeals said military rules must be narrower to compensate for lay personnel making courtroom decisions.²¹⁷

"One of the most disturbing" decisions from the Court of Military Appeals during the early years of Chief Judge Everett's supervision was *United States v. Morgan*.²¹⁸ Relying on past practice and the Manual for Courts-Martial, government counsel offered a portion of the accused's record, the portion intended to enhance punishment. Defense counsel moved to have government introduce the entire record and stated he wanted to preclude government from being able to offer rebuttal evidence to the accused's good conduct evidence. The military judge ruled government counsel must introduce the complete record, but also allowed the government to rebut the record.²¹⁹

The Court of Military Appeals overturned the trial judge reasoning that a complete record was necessary to adjudge appropriate sentence. The Court of Military Appeals even compared the personnel record to the presentence report, but insisted that Military Rule of Evidence 106 controlled.²²⁰ Unfortunately, the majority failed to recognize the dichotomy of its ruling. The federal system, especially through presentence reports, advocates an open, free exchange of information. The Court of Military Appeals ruled that evidence must be complete, to enhance the court's understanding of the evidence, but realistically the ruling provided defense counsel one more major tactical weapon.

C. CURRENT MILITARY SENTENCING LAW FROM 1983

As the administration did in previous years, it sought Congress' help to overcome some of the Court of Military Appeals' rulings and other shortcomings in military justice.²²¹ Beginning in 1980, the military attempted to win Congressional support for several changes to the UCMJ. After years of debate, hearings, and piecemeal legislation, the military's effort reached fruition in the MJA of 1983.²²²

1. Today's Uniform Code of Military Justice

The major revisions to the pre-1983 UCMJ affected pretrial, trial, and post-trial procedures. Concerned about unlawful command influence and wanting a more efficient pretrial procedure, the MJA of 1983 absolved the convening authority of two prior duties. Court personnel, to include the military judge

and counsel would be detailed per service regulations instead of the convening authority.²²³ This change coincided with the shifts by the services to an independent judiciary and defense counsel organization.

Congress also amended Article 34 to no longer require the convening authority to review the pre-trial investigation for the purpose of determining the legality of the charges.²²⁴ Secretary of Defense Casper Weinberger said the change would take a complex legal decision, referral of major criminal charges, from a layman's hand and put the assessment in the hands of a trained professional, the SJA.²²⁵ As noted by the Committee, this codified a practice already informally in place in the field.²²⁶

Two amendments considered by Congress, but tabled for further study involved increasing the confinement jurisdiction of SPCM to one year and providing for sentencing by military judge alone in all noncapital cases.²²⁷ DoD and other proponents of the jurisdictional punishment of SPCM argued that raising the maximum to one year would decrease the number of GCM referred by commanders simply because commanders believed a six month maximum was not stringent enough.²²⁸ The other issue, not supported by DoD, involved removing members from the sentencing decision and authorizing sentencing by military judge alone in all noncapital cases. Unlike the other proposal, no consensus existed between the branches. The Army opposed the change, the Navy and Marine Corps supported the change, and the Air Force and Coast Guard favored the Army's position.²²⁹

The comments of Brigadier General W. Tiernan, and General Clausen typify the juxtaposition between the branches. General Tiernan asserted that the proposed changes, to include sentencing by military judge alone, could enhance military justice by enhancing discipline, while protecting due process.²³⁰ General Clausen asserted that the Elston Act of 1948 endorsed peer sentencing.²³¹

2. Today's Manual

A completely reorganized new look Manual for Courts-Martial resulted in 1984.²³² Rules for Courts-Martial with discussion and analysis were included for the first time. An expanded version of Paragraph 75 of the old Manual for Courts-Martial became Chapter X of the new Manual for Courts-Martial.²³³

In an effort to allow evidence of rehabilitative potential to be introduced by the government during presentencing, the President allowed government to introduce opinion evidence of rehabilitative potential.²³⁴ This change to paragraph 75 of the Manual for Courts-Martial of 1969 nullified the ruling in *United States v. Konarski*,²³⁵ where the Court of Military Appeals precluded government counsel from entering evidence of potential for rehabilitation first. As a result of *Konarski*: savvy defense counsel could foreclose the sentencer from ever hearing harmful evidence of lack of rehabilitative potential. The Court of Military Appeals did not take the change quietly. In a string of cases beginning with *United States v. Ohrt*,²³⁶ the Court of Military Appeals has effectively barred the door for government

counsel to enter evidence of rehabilitative potential by implanting numerous procedural hurdles. Rule for Courts-Martial 1001(b)(5) resulted because of concern for an individualized sentence and a desire to provide members or the military judge the same information federal court judges receive in presentence reports.²³⁷ The Court of Military Appeals's latest decisions continue to illustrate the court's confusion on the purpose of sentencing.

As illustrated with evidence of rehabilitative potential, the Court of Military Appeals often ignored the President's intentions and a need for informed sentencing. The President overruled *Morgan* with the changes to the Manual for Courts-Martial of 1984 to eliminate gamesmanship and provide more information for consideration during sentencing.²³⁸

The President in regard to conviction evidence said neither the six year rule nor final review was required when considering the admissibility of prior convictions.²³⁹ Holding evidence inadmissible based on the absence of review or length of time from the date of conviction hinders an informed sentencing process. The President decided such procedural questions should affect the weight not the admissibility of such evidence.²⁴⁰

Rule for Courts-Martial 1001(b)(4) extended the Court of Military Appeals's ruling in *United States v. Vickers*.²⁴¹ Not only could aggravating evidence be admitted in not guilty plea cases, or even if inadmissible on the merits, but bad character evidence could be introduced to show motive or intent.²⁴² The

1984 Manual for Courts-Martial showed a strong desire for informed sentencing decisions and predilection for federal sentencing procedures.

The 1984 Manual for Courts-Martial provides for arguing federally accepted sentencing philosophies such as rehabilitation, general deterrence, individual deterrence, and retribution.²⁴³ Neither the 1984 Manual for Courts-Martial nor the Military Judge's Benchbook provide a specific sentencing purpose to guide the sentencer in determining an appropriate punishment.²⁴⁴ Unlike federal procedures the new changes to the 1984 Manual for Courts-Martial continue to provide for an adversarial sentencing process.

The 1984 Manual for Courts-Martial did get rid of the post trial clemency report and, in line with UCMJ changes, streamlined SJA and convening authority review of records.²⁴⁵ Under present military law, the accused's first complete legal review in most GCM occurs at the Court of Military Review. Even though the look of the 1984 Manual for Courts-Martial changed radically, the drafters and Congress agreed with General Clausen's view that prior practice and heritage outweighed extensive change to military sentencing procedures.

IV. ADAPTATION OF FEDERAL GUIDELINES TO COURTS-MARTIAL

I would have thought that you'd [the Commission] have started...with a very simple document and a very simple set of guidelines that judges, brand new to this and

wholly unaccustomed to it, and their probation officers as well, would not view with a kind of fright that I think this preliminary set [of guidelines] will engender.

*Judge Marvin L. Frankel, the Father of the Guidelines*²⁴⁶

The current Guidelines incorporate over 1000²⁴⁷ federal statutory violations into 19 generic offense categories. Only felonies or class A misdemeanors fall within the Guidelines control.²⁴⁸ Corporations as well as individuals can face criminal conviction for a Guidelines violation.²⁴⁹ Congress wanted a set of guidelines which would address serious offenders committing serious offenses. This section will discuss the significant problems recognized in application of the Guidelines and pose possible solutions to some of the problems that could impact on a military guidelines system patterned after the federal scheme.

A. JUDICIAL POSTURE

In toto adoption of the Guidelines would not work. The Guidelines govern criminal statutes such as racketeering that military law does not encompass. Guidelines also pertain to offenders such as corporations over which the military has no jurisdiction or desire to prosecute. If a service member violates federal law, he may be prosecuted by the federal government unless outside the territorial jurisdiction of the United States. As a result, expanding the punitive articles to

specifically include all federal law serves no viable purpose and would greatly complicate prosecution efforts.

Military appellate courts function in the military justice system by providing appellate case law on significant military-related legal issues. As noted in the discussion in Section III, appellate decisions often prompted changes to the UCMJ and the Manual for Courts-Martial. Originally known as the Judicial Council and the Boards of Review, the Court of Military Appeals and the Courts of Military Review have earned judicial and congressional respect.²⁵⁰

Article 67 in its present form bears little resemblance to its predecessors. The Court of Military Appeals now sits as an independent legislative court with no ties to the DoD except for its statutory mission. The Court of Military Appeals reviews military cases for legal error and may also entertain special writs under the All Writs Act. The Court of Military Appeals resolves legal disputes between the Courts of Military Review and may be asked by the JAG to provide advisory opinions. Other than advisory opinions and writs, the Court of Military Appeals has absolute discretion in the cases and issues it hears.²⁵¹

Each branch of service has an independent Court of Military Review. Each Court of Military Review functions remarkably like a circuit court. One major difference lies in manning; Courts of Military Review have senior military judges on their panels.²⁵² These judges, just like the judges who serve at the Court of Military Appeals, while possessing special qualifications, are

not Article III federal circuit judges.²⁵³ In deciding questions of law and fact, entertaining extraordinary writs, hearing government appeals, and making case law for their respective branches of service, Courts of Military Review act, perform, and look like super circuit courts.²⁵⁴

When evaluating the impact of Guidelines on the military appellate system three key differences between the federal and military systems must be considered. First, federal appellate courts hear civil and criminal appeals. Because the military justice system's jurisdiction lies only in criminal law, military courts never get involved with civil cases. In some federal circuits, civil cases, often involving complex claims, take up a majority of the court's docket. As a result, federal judges must split their legal expertise, training, and docket space among civil and criminal case law. Trial judges, judges of the Courts of Military Review, and the judges of the Court of Military Appeals can devote their entire career to the study and development of criminal law and the sentencing guidelines.

Second, under Article 66, an accused convicted at GCM already has right of automatic appeal to the Court of Military Review.²⁵⁵ This right has existed in all branches of the service since inception of the UCMJ. Federal law did not permit automatic appeal until the Guidelines. Prior to the Guidelines, Circuit Courts only reviewed sentences for not complying with congressional limits or clear abuse of discretion. Under the Guidelines, either government or defense can appeal an

unreasonable departure or illegal sentence. As a result, the military justice system has forty plus years of sentencing law which federal circuit courts do not possess.

The government's right to appeal sentences in the military has never existed, so in that vain new sentencing law would be created. Prior to the Guidelines federal law limited sentence review to whether the trial judge imposed a sentence which exceeded the maximum permissible punishment, or was below the minimum required sentence.²⁵⁶ Fortunately, since the Guidelines, federal courts have heard and decided many issues that would undoubtedly face a military guideline system.²⁵⁷ In those areas where the two guideline systems replicate each other, federal law could provide guidance for the Courts of Military Review. Although of no precedential value, state guideline law could assist in developing appropriate legal analysis.²⁵⁸

Third, under Article 70,²⁵⁹ military accused are automatically assigned appellate counsel. While some contend that having the same lawyer represent you at trial and on appeal is advantageous, automatic right to military appellate counsel allows all accused, whether rich or poor, the opportunity for appellate representation. In addition, for the time that military appellate counsel are assigned that duty, appellate law is their sole concern.

While military appellate law has never faced a guideline system, experience and precedent in sentencing issues is extensive.²⁶⁰ An active, viable appellate structure exists to

handle guideline appeals. Additionally, federal and state judicial experience with issues involving sentencing guidelines provides the military justice system a tested resource tool.

B. DISPARITY

One of the primary driving forces behind the Guidelines was sentencing disparity. Congress wanted equal sentences for similar criminals committing similar offenses.²⁶¹ To enhance Congressional sentencing purposes, the Commission balanced uniformity and proportionality.²⁶² In developing a military guideline system, military advisors can learn from the work of the Commission and its critics.

Disparity has two interdependent components: uniformity and proportionality. A military guideline system must determine how to balance the two components so that unwarranted disparity is minimized. As critics have noted, disparity can result at all stages of the judicial process, not just at the sentencing phase.²⁶³

1. Courts-Martial Data

The first step the Commission took in attacking disparity is essential to development of a guideline system. The Commission analyzed cases to determine past sentencing practices and the extent those past practices met congressional goals.²⁶⁴ What follows is a rudimentary comparison of four general offense categories and the resultant sentences.

I chose four categories of offenses which frequently are charged as the primary charge at GCM. The four categories are

aggravated assault (Article 128),²⁶⁵ rape (Article 120),²⁶⁶ drugs (Article 112a, other than simple possession),²⁶⁷ and robbery (Article 122).²⁶⁸ Where it was unclear from the data provided what was the primary offense, I did not consider that case. From the three main branches of service, Army, Navy (to include Marine Corps), and Air Force, I requested data for GCMs in the above offense categories tried during 1990, 1991, and 1992. Because the Navy was only able to provide me with data for 1992, I restricted my review for all the services to 1992. The above restrictions resulted in small numbers of cases for comparison, but (except for robbery in the Air Force) enough data was available to note general trends.

Appendix A contains a breakdown of the sentencing results. Those results illustrate the wide disparity in military sentencing. For example Appendix A shows that confinement adjudged by Navy military judges ranged from no confinement to 540 months in the rape chart. For Army member sentencing the range for rape cases went from no confinement to 720 months confinement. Out of all the cases reviewed, the members were consistently more likely to deviate from the average confinement periods indicated in Appendices A-5 through A-8. As a result, sentencing by judges produce more uniformity in sentencing. The data, however, indicate that judges also had widely disparate sentences.

Because I did not review the actual records, it was not possible to determine what factors influenced the sentencing

decision of the sentencer. One conclusion did result from the data reviewed from the Navy; sentencers were considering those factors the Guidelines identify as normally irrelevant for sentencing decisions. Comments supplied by the Navy judges on their data reports to Navy-Marine Corps Trial Judiciary indicated that for their sentencing decisions they considered such factors as pregnancy, disadvantaged childhood, intoxication, and previous offenses. They also commented on occasion that counsel were or were not prepared, or that the case was extremely complex. The Navy data indicate the trend among members as well as judges with additional comments reflecting the correctness of the members' sentencing decision.

Congress specifically mandated that the Guidelines would not reflect discrimination for race, sex, national origin, creed, and socioeconomic status.²⁶⁹ Other factors such as education, employment record, family and community ties were generally considered inappropriate when determining whether to sentence to imprisonment and the length of imprisonment.²⁷⁰ Congress wanted the sentence to reflect the criminal conduct, and, except in extraordinary cases,²⁷¹ not personal factors. Congress was not interested in individualizing sentences and the Guidelines have attempted to comply.

The Navy data indicate that sentencers applied discriminatory factors during their sentencing process. In the Commission and GAO reports supposedly irrelevant characteristics coincided with sentence disparity. The military data reflects

that officers and women routinely received less confinement than other offenders for similar offenses. Member sentencing exacerbates the differences by increasing the deviation from the average punishment. Military guidelines with discipline as a sentencing purpose should follow the restrictions set forth in the federal Guidelines. Additionally to enhance discipline, discrimination by rank or position should be prohibited.

Data reflected in Appendices A-9 through A-12 indicate that a discharge is almost always adjudged in a GCM. The data reviewed also reveal that most dishonorable discharges resulted in cases where a large amount of confinement was adjudged. However, dishonorable discharges were adjudged by judges and members for offenses where the adjudged confinement was less than two years.²⁷²

With the inclusion of Article 58a, which mandates automatic reduction to the lowest pay grade when confinement adjudged exceeds 90 days or a punitive discharge is adjudged, reduction is not a major sentencing factor.²⁷³ The data corroborate this conclusion. Additionally, commissioned officers may not be reduced by courts-martial.²⁷⁴ Senior enlisted are seldom reduced to the lowest pay grade.²⁷⁵ Almost invariably, as the data support, offenders who receive confinement at GCMs also receive total forfeitures for the confinement period.²⁷⁶ Confinement and discharge comprise the only consistent variables in the data for punishment adjudged.²⁷⁷ Military sentencing guidelines should,

therefore, incorporate length of confinement and characterization of discharge in the sentencing table.

Congress' 25% bracket around average sentences appears an appropriate model to guide military guideline development.²⁷⁸ To determine the adjusted mean figure for each offense category, not only the sentencing purpose, but the optimum balance between uniformity and proportionality must be considered. As noted by Commissioner Nagel, the Commission's offender characteristics directly relate to their decision on the appropriate balance between the two factors and the sentencing philosophies.²⁷⁹

Some critics argue that the Commission did not factor enough proportionality into the sentencing equation. They refer to examples where sentences lose the appropriate balance between misconduct and personal characteristic. They argue that the resultant uniformity in sentencing by ignoring relevant proportionality considerations, adversely impacts on disparity.²⁸⁰ The Commission and its supporters argue that more proportionality would create unworkable guidelines because of the myriad combinations which would need to be considered.²⁸¹

The Commission based its offender characteristics on the most commonly encountered factors affecting the sentencing decision. Those factors show up as adjustments or enhancements in the Guidelines.²⁸² Military guidelines should incorporate relevant factors into determining the base offense level. The data reflect that factors like use of a weapon, duty status, and detriment to the command might be appropriate basis for upward

adjustments. An example of downward adjustments might be the provoking actions of the victim. The Commission contends these type of factors provide the appropriate balance in Guideline sentencing decisions.

In addition, Commissioner Nagel and others argue that proportionality can be increased in appropriate cases by departures.²⁸³ Departures, however, are largely at the sentencer's discretion, meaning that use of departures, unless uniform, will increase disparity. Military guidelines should authorize departures for extraordinary cases. Unlike the federal system, the amount of departure should be specified.

2. Pre-charging Decisions

Two other areas effect disparity: pre-charging decisions,²⁸⁴ and judicial departures.²⁸⁵ The Commission noted that 17%²⁸⁶ of the cases it reviewed were effected by pre-charging decisions of the prosecutor. A recent study conducted by Commissioner Nagel and Professor Schulhofer indicate that the percentage may be as high as 35%.²⁸⁷ These findings correlate with the criticism that the Guidelines shifted the power of the judge, an impartial party, to the prosecutor whose job often rides on his rate of conviction and sentence results.²⁸⁸ An interview with a federal prosecutor, who also is a judge advocate, supported the transfer of power argument.²⁸⁹ In his words, unlike the military where the prosecutor merely tries the case, a United States Attorney makes all of the decisions. When asked about the Thornburgh Memoranda,²⁹⁰ he indicated that a body was created to whom he must

present his charging decisions and plea agreements, but that his office's supervisory body had never overruled any of his decisions.

As alluded to by the interviewed United States Attorney, military prosecutors do not possess charging authority. Under Article 25, the convening authority determines whether or not to bring charges, the forum to handle the charges, and the charges to bring against the accused.²⁹¹ Convening authorities routinely rely on the advice and recommendations of judge advocates in making charging decisions,²⁹² but the ultimate decision is theirs. Only a judge advocate's ethical obligations would support refusing to follow the Convening Authority's desires. This built in checks-and-balances affords much of the protection critics allege the Guidelines lack. The military prosecutor, while evaluated for his advocacy skills,²⁹³ does not have the interest in optimizing charging decisions as his civilian counterpart.

The military charging and plea bargaining authority,²⁹⁴ the convening authority, is usually either the accused's Commanding Officer or Commanding General. As such, the convening authority is in a position to determine appropriate resolution based on the proportionality concerns raised by Guideline critics. As the accused's commander, convening authorities have access to an accused's supervisors, peers, and personnel records.²⁹⁵ Often the convening authority is intimately aware of an accused's family and financial concerns. In addition, the convening authority is

in a direct position to consider uniformity in his charging decision and the impact his decision will have on his Command.

The data reflect that convening authorities affect adjudged sentences about 30% of the time by the use of pretrial agreements. To control disparity, military guidelines should specify the variance from the sentencing range a convening authority can authorize. Absent this control, pre-charging decisions in the military could result in severe unwarranted disparity.

3. Judicial Departures

The convening authority can also ameliorate the other source of hidden disparity, judicially created disparity. Under Rule for Courts-Martial 1107, based on the record of trial and post-trial matters submitted by the accused, the convening authority for any reason whatsoever can disapprove findings or sentence, reduce findings to findings of guilty for a lesser included offense, suspend, mitigate, remit, or disapprove the sentence in whole or in part.²⁹⁶ The convening authority is in the position to factor in the human side, the personal characteristics, which the Guidelines (mainly in policy statements,) ²⁹⁷ assert are irrelevant sentencing factors. Critics of the Commission's position toward personal characteristics point to cases like *United States v. Lara*²⁹⁸ and *United States v. Big Crow*²⁹⁹ to show the need for the sentencer to consider personal characteristics. In the military, the convening authority who approves and executes the sentence, can weigh the personal characteristics

which militate sentence reduction or enhancement against the needs of his Command and the military community.

Based on the data gathered from the field, convening authorities rarely modify an adjudged sentence absent a pretrial agreement requirement. From data reviewed, less than 1% of all sentences not affected by a pretrial agreement were changed by convening authorities. What the data does not show is how many upward departures convening authorities would request. Under current military law, neither the convening authority, Court of Military Review, nor the Court of Military Appeals may increase an accused's adjudged sentence.³⁰⁰ Neither the Constitution, federal case law, nor military case law precludes adoption of the appellate courts authority to remand unreasonable downward departures for corrective action.³⁰¹

C. SENTENCING PHILOSOPHY

The Commission determined that a unique, specific sentencing philosophy was unnecessary. Critics such as Professor Parent argue that a defined single sentencing purpose focuses the entire sentencing process and helps eliminate disparity.³⁰² As the Commission discovered, defining a single sentencing purpose is difficult if not impossible.³⁰³

1. Case Law

Section III illustrates the difficulty the Court of Military Appeals had with defining and consistently applying a single sentencing philosophy. Absent the Court of Military Appeals's particular rulings regarding sentencing argument,³⁰⁴ no single

sentencing purpose controls judicial sentencing decisions. The resultant decisions reflect the court's composition much the same as the Commission indicated its multi-purpose sentencing philosophy would vary dependent on judge or case situation.³⁰⁵ This multi-purpose scheme evokes visions of the rudderless system of law which caused Judge Frankel to advocate for a guideline system.³⁰⁶

2. Statutory and Regulatory Guidance

Military statutory and regulatory guidance do not identify a single sentencing purpose for military law. Only in the military judge's instructions to members on sentencing do members receive any type of guidance on applicable sentencing philosophies.³⁰⁷ Those philosophies bare a marked resemblance to the Guidelines variant sentencing philosophies.³⁰⁸ The one notable difference is the military's inclusion of rehabilitation, although Congress, the public, and legal scholars have dismissed rehabilitation as a realistic sentencing goal.³⁰⁹

Throughout the legislative history of the UCMJ one common sentencing purpose, discipline, was repeated over and over again. General deterrence, just deserts, rehabilitation, and incapacitation were never advocated as reasons reform of military justice or the UCMJ. Because of the military's unique job, war-fighting, Congress, lawyers, commanders, veterans, and interested citizen groups all acknowledged that the purpose of the military justice system is to garner obedience through strict discipline.³¹⁰ Congress has repeatedly been asked to remove some,

if not all, of the control the convening authority has over courts-martial.³¹¹ Recognizing the fragile counterpoise between discipline and obedience, Congress has made only modest attacks on the commander's control over discipline.

The legislative history of the UCMJ shows Congress' acknowledgment of the link between obedience and discipline.³¹² The commander, who must garner obedience from his subordinates is in the best position to determine how to attain that obedience. Mr. Taft's prepared statement to the committee sums up the delicate balance between the military criminal process and discipline.³¹³ Mr. Taft argued that in that pact between the public and the armed forces, Congress ensures societal demands are met and the President ensures commanders' disciplinary needs are satisfied, subject to congressional limitations.³¹⁴

"Good order and discipline" are key phrases in military command.³¹⁵ Absent them, the unit's ability to accomplish its mission suffers. "Good order" is synonymous with discipline, if the discipline is just.³¹⁶ Based on military history and the legislative history of the UCMJ, discipline, not individualized sentencing, serves the needs of the military machine. An appropriate sentencing philosophy is discipline.

Because military discipline is swift and sure, a charge offense structure serves that end. Real offense convictions become unnecessary in a system where discipline is the primary sentencing purpose. The accused needs to be punished for the offense and attendant relevant conduct, not something stale.

Cumulative offensive conduct can be dealt with administratively if a court does not award a discharge.

D. BIFURCATED PROCEEDINGS

In courts-martial, the sentencing hearing usually immediately follows the case on the merits. In fact, in a members trial, the military judge will usually conduct an Article 39a session to discuss any evidentiary pre-sentencing matters while the members are deliberating on findings so that the presentencing hearing can begin immediately if the members return a finding of guilty.³¹⁷ Sometimes in complex criminal cases or lengthy trials, the judge may recess the court for a few hours to as long as a few weeks.³¹⁸

1. Impact on Processing Times

One of the most compelling criticisms to creating a military guideline system centers on the bifurcated hearing always used in federal Guidelines. Commanders constantly complain about the amount of time they are saddled with an accused before he goes to trial. As the GAO reported, federal Guidelines increased pretrial and post-trial times,³¹⁹ but did not change actual trial and sentencing times. With the reduction in number of courts-martial³²⁰ and the reduction in force, processing times, even when including the impact of bifurcated hearings, should decrease dramatically.³²¹ As noted by the GAO, some of the delay resulted from unfamiliarity with the Guidelines,³²² so processing times should go down as users become more adept.

To further obviate this problem, commanders should understand the insignificant difference between the results of SCM and SPCM. By referring less SPCMs, commanders would free up counsel and judges to handle GCMs more quickly. If looking for an instant attention-getter, a SCM with the possibility of thirty days confinement provides a quick effective solution. Because SCMs do not have all of the procedural safeguards associated with SPCM and GCM, SCM take very little time to complete.³²³ If Commanders are concerned that a SCM does not provide for discharge, all secretarial regulations contain provisions for administrative discharge under other than honorable conditions for commission of serious offenses.³²⁴

2. The Role of Probation Officers

Bifurcated hearings in the federal system occur largely because probation officers need time to conduct a presentence investigation and prepare the presentence report. The Court of Military Appeals, Courts of Military Review, participants in the legislative history of the UCMJ, and drafters of the analysis to the Manual for Courts-Martial of 1984 repeatedly compare military justice requirements and the requirements of the presentence report.³²⁵ If the military implemented a charge offense system, the information required in a presentence report would be minimal. Offender characteristics would not be included; convening authorities would factor them in during post-trial review. Actually, the presentence report in a military guideline

system would not be the problem; the problem centers on who would prepare the report.

The military justice system has no probation officer. Under Rule for Courts-Martial 1002,³²⁶ probation is not a punishment authorized for courts-martial. Due to the military's need for swift punishment and deployable forces, probation is inimical to military justice. Even though military sentencing does not include probation, a military guideline system should include probation officers. Federal Guideline experience has proven the value of a probation officer to the judge during the sentencing phase of the court. As noted in the ABA Survey, the probation officers were considered the most knowledgeable participants in application of the Guidelines. Federal Rule of Criminal Procedure 32(c) specifically places the weight of gathering the presentence information on the probation officer. Because of the probation officer's training and experience he is vital to presentencing decisions.³²⁷

In the military, three potential sources exist for acquiring a probation officer that would cause minimal disruption and no increase in personnel end strength. First, one author recommended the use of corrections specialists as probation officers.³²⁸ At the time of his recommendation, the transfer of personnel from the correction's system would have been too disruptive to the military prison system. With the consolidation of the military prison system and the closing of several regional prisons, homeless corrections specialists may be available to

prepare presentence reports.³²⁹ If used, their job titles and occupational codes should be changed to probation officers to legitimize their position in the sentencing structure. To prevent command influence or the appearance of bias, these new probation officers should be assigned to the military's judiciary sections. The benefit of using corrections specialists derives from their specialized training. Many are already qualified to prepare federal presentence reports.³³⁰

Second, a military magistrate who functions much like a United States Magistrate could become a probation officer. Although the Army has a Magistrate program in place, the other services do not. The other services, however, have senior judge advocates available to use as Magistrates. This option would probably require implementation of a service wide Magistrate program. Full-time Magistrates could then assume the role of probation officer as an additional duty with minimal impact since the duties would be somewhat related.

As a final alternative, I would recommend an attorney from either the legal services or administrative law section. With the anticipated increased reduction in personnel in all of the branches of the service, this attorney could be dual-hatted. For the time he serves as probation officer he should be assigned to the judiciary for fitness report purposes, but continue to work in his other job. Probation officer duties would be considered the attorney's primary duty with his other job rated as an

additional duty. Each of the services has in-place an evaluation mechanism to allow for such a rating scheme.

The obvious disadvantages of this third suggestion are the lack of experience and continuity available from an attorney who can only be dedicated to the assignment for a relatively short period of time, and the attorney's increase in workload.³³¹ However, the advantages are numerous. As an attorney, this type of probation officer would have experience with courts-martial, specifically the information needed to make a sentencing decision. The attorney would already be subject to ethical rules, so the cross-over to a probation officer whose work is privileged would not be a difficult step to make. This option would also provide a probation officer who is located close to the trial and defense counsel.

As noted by the participants in the ABA survey, judges rely heavily on the recommendations of the probation officers.³³² Also noted in the ABA survey, after five years of Guideline use, all participants indicated judges, counsel, and probation officers required more training.³³³ Although I do not envision a military guideline system as complicated as the federal Guidelines, such a system will require learning a new sentencing system. Based on the number of amendments to the federal Guidelines under its evolutionary concept,³³⁴ probation officers will need to be experienced in military guideline law to keep up with the changes.

3. The Presentence Report

The military judge can handle objections to presentence information according to local judicial procedures. Both trial and defense counsel should submit relevant sentencing information prior to trial for the probation officer to consider in his recommendation and attach to the presentence report for the judge. Military rules of evidence and procedure should be modified to make the probation officer's work privileged so that defense cannot refuse to provide pretrial information to the probation officer.³³⁵ This new privilege would extend to attorney-client communications.³³⁶

Federal rules permit disclosure of the report once the accused enters pleas of guilty or a finding of guilty is made.³³⁷ In a guilty plea case, the military judge could arraign the accused prior to the trial on the merits to permit the probation officer time to prepare his report with the assistance of the accused. In contested cases, the probation officer would prepare a preliminary pretrial report for pretrial review by trial and defense counsel. After trial and defense counsel review the report and note objections, the package would be forwarded to the judge for review. The judge could resolve many potential problems with a prehearing conference, authorized under Rule for Courts-Martial 802, or at an Article 39(a) trial session. This procedure allows for a substantially complete presentence report prior to the presentencing hearing.

Because some of the information was obtained from the accused under privileged communications, use of that information to administratively discharge the accused could result in a due process issue. Because a respondent at an administrative discharge hearing only receives minimal due process, providing the accused the opportunity to rebut evidence previously provided should satisfy due process. Of course, the other problem would be the chilling effect of such action on the accused's cooperation with the probation officer. The federal system has experienced this chilling effect on the defendant's participation in the information gathering phase.³³⁸ Under current administrative discharge regulations, an accused must receive an honorable-based discharge if the decision to discharge results solely from misconduct which was previously the subject of an acquittal or for which a discharge was not adjudged.

If a finding of guilty results, then the court would recess while the report is completed and final objections are resolved. This should take no more than one or two days³³⁹ because all that remains is the calculation of the offense of conviction, an interview with the accused, and resolution of objections. All other information can be prepared beforehand.³⁴⁰ In the event of an acquittal, the information could be used to administratively discharge the accused, if the Commander deemed such action necessary for discipline.

Almost all installations have temporary holding cells.³⁴¹ These cells are routinely used for pretrial confinees. Based on

a finding of guilty the military judge could make a determination as to whether the accused should be confined pending sentencing.³⁴² These proceedings could be fashioned after pretrial confinement hearings with the judge basing presentence confinement on flight risk, likelihood of further criminal conduct, and the military's sentencing purpose, discipline.³⁴³ Because the court found the accused guilty, the burden should rest on the defense by a clear and convincing standard to show why the accused should not be confined pending sentencing. Lastly, presentence confinement would count day-for-day against any confinement approved by the convening authority.

E. DUE PROCESS AT THE PRESENTENCE HEARING

At the presentence hearing, many of the gratuitous procedural rights provided the accused (such as the right to call witnesses, the right to be informed of all government witnesses, and limitations on the relevant information the sentencer may consider) may be eliminated without depriving the accused of any constitutional rights.³⁴⁴ As pointed out by General Tiernan in testifying before the committee on the MJA of 1983, many of the procedural safeguards provided the accused result from days when counsel were not assigned to courts-martial and judges did not sit to decide issues of law, interlocutory questions, and issues of fact (in a judge alone trial).³⁴⁵ The original UCMJ resulted from Congress' determination to stop gross miscarriages of justice administered on servicemembers by unguided commanders.³⁴⁶ Today, Commanders receive advice from military attorneys during

every phase of the disciplinary process. Consequently, the procedural protection originally adopted to safeguard the accused from illegal actions by laypersons are unnecessary. Ethical obligations, service regulations, and the participation of attorneys at all phases of the court-martial, ensure protection of the accused's constitutional rights.

The Supreme Court interpreted the 5th Amendment as requiring only limited due process during sentencing in all but capital cases.³⁴⁷ The accused has the right to be represented by counsel, to be present, and to say something if he chooses.³⁴⁸ If the judge elects to hold an evidentiary hearing,³⁴⁹ the judge, not the accused, determines what evidence will be considered and how it will be considered. Without judicial permission the accused has no right to submit matters for consideration, to include calling witnesses and cross-examination.³⁵⁰ As discussed in Section II, the court has never ruled on the due process issues involving the Guidelines, but the circuits have uniformly held that Guidelines do not violate due process.³⁵¹ Some critics argue that due process should be expanded under Guidelines because the resultant sentences arise from questions of fact not law.³⁵²

The protection provided a civilian accused are adequate to protect the military accused. The Court of Military Appeals has expanded procedural rights during sentencing throughout its history, often providing greater protection than the Supreme Court required. Congress through the UCMJ also persists in burdening the military justice system with unnecessary,

inefficient, and costly procedural rights. In a sentencing system based on discipline, the use of sentencing witnesses instead of affidavits, the restrictions on considering information relevant to the charges, unless charged or offered through testimony, and the ban on the use of information regarding the accused's usefulness to the military preclude informed sentencing.

Protectors of the old way, while acknowledging that no constitutional requirement exists, argue that the servicemember expects and deserves these rights created by the Court of Military Appeals and Courts of Military Review.³⁵³ The legal system, however, created many of these rights when the servicemember had only limited legal assistance in fighting his case.³⁵⁴ Qualified defense counsel are now detailed to every GCM and SPCM case under the current UCMJ. Defense counsel are bound by ethical considerations and the threat of ineffective assistance if they do not effectively represent their clients.³⁵⁵

F. SENTENCE IMPACT

While debating over a sentencing purpose and the proper balance between uniformity and proportionality, the Commission was also designing the sentencing grid and determining what variables the grid would reflect.³⁵⁶ Based on Congressional mandate for truth in sentencing, the Commission developed a determinate sentencing model, the Guidelines.

1. Parole

Under the previous federal indeterminate sentencing system, no one knew how long an offender would be in jail; how much of his adjudged prison sentence he would serve prior to receiving parole. The parole commission's guideline system created some uniformity in parole decisions, but not in sentencing.³⁵⁷ Many judges would attempt to second-guess the parole decision, so that the offender would serve the sentence the judge desired. Judges often guessed wrong, exacerbating sentencing disparity.³⁵⁸

The military parole system operates independently of the United States Parole Commission.³⁵⁹ The military parole system was created along with military correctional facilities to accommodate the evaluation, training, and parole of military prisoners.³⁶⁰ Parole of military prisoners focuses on returning the service member back to the civilian community, not to the military environment.³⁶¹

Military parole focuses on the same goal the United States Parole Commission does, rehabilitation. Whether or not the military is a microcosm of society, rehabilitation has been discarded by the same system which supported its adoption. As did federal parole, military parole only contributes to a military sentencing system of disparity and uncertainty.

Because the military uses members in sentencing, lay persons normally unaware of the parole mechanisms, the accused seldom serves the sentence imposed by the community. When the military community discovers the real sentence, disrespect for the justice

system results. Lack of respect creates morale problems, which in turn foster disobedience, the antithesis of discipline. Sentencing by military judges creates some uniformity,³⁶² but military judges also attempt to second guess parole boards and convening authorities.

2. The Sentencing Grid

To implement its determinate sentencing module, the Commission created a sentencing bracket utilizing the full 25% range.³⁶³ This sentencing range comprised the heartland of the offender's expected sentence based on offense category and criminal history. The Commission intentionally left the range as wide as statutorily authorized to provide judges with some flexibility in sentencing.³⁶⁴ By allowing deviation from the range for extreme cases while providing a rigid punishment range, the Commission struck a valid compromise. A military guideline system could adopt the same approach keeping in mind the different purpose for military sentencing.

A factor no one anticipated when the Guidelines were implemented was the impact of mandatory minimum sentences. In a study ordered by Congress, the Commission found mandatory minimum sentences fostered disparity in sentencing.³⁶⁵ Because mandatory minimums do not permit any departure, trial judges complained, and the Commission found, that offenders of vastly different culpability levels received the same punishment. Not only do judges, counsel, scholars, and the Commission, suggest getting rid of mandatory minimums due to the resultant

indiscrimination,³⁶⁶ the Commission's study shows mandatory minimums affect any meaningful analysis of Guidelines disparity.³⁶⁷

Bowing to the pressures of activist and citizen groups, Congress created mandatory minimums. Mandatory minimums have sabotaged the Commission's work³⁶⁸ and provided further animosity toward the new sentencing system for those who fail to differentiate between Guidelines and mandatory minimums.³⁶⁹ The Commission compounded the confusion when it elected to incorporate those minimums in its sentencing grid. The Commission's decision, as at least one critic explains, caused the entire offense category to be lifted for the targeted offense group instead of using the mandatory minimum for the particular offense as an overlay; a trump card.³⁷⁰

The military has few mandatory minimum sentences, but those mandatory sentences should not be incorporated into the grid. They should remain outside the grid, so that levels are not artificially elevated. Where Guidelines provide some flexibility in sentencing with its bracket and departures, a mandatory minimum is just that; if the offender violates the targeted offense he must receive, at least, the mandatory minimum.

3. Prison Population

In the Sentencing Reform Act, Congress required the Commission to consider the impact on prisons when drafting the Guidelines. Congress also required that the Commission determine how to accommodate an increase in prison population which might

result from stricter sentencing.³⁷¹ The Commission determined that uniformity and imprisonment for some first-time offenders not previously subjected to confinement were more important factors than specifically developing a Guideline system tied to prison capacity.³⁷²

Because the Commission created more categories where prison, even if for short periods, was required, prison capacity will continue to be a problem. Guidelines to reduce disparity do no good if prisoners are released by court order or not sent to jail due to overcrowding. Critics of the Commission's sentencing approach emphasize the Commission's disregard for penal conditions and assert that alternative sentencing be expanded³⁷³ or an intermediate parole procedure be adopted.³⁷⁴ In response, in its 1992 amendments, the Commission added the possibility of no confinement to two more levels of its sentencing grid.³⁷⁵

The military prison system operates separately and independently of the federal prison system.³⁷⁶ As a result, military confinement facilities were not affected by the increase in confinement for federal offenders. However, under the consolidation order for military prisons, several military prisons are closing. Remaining military prisons will be purple, accepting prisoners from all branches of service.³⁷⁷ Depending on the amount of confinement approved by the convening authority, prisoners are confined in either category I or category II regional facilities, or for those receiving lengthy confinement,

the Armed Forces Disciplinary Barracks in Fort Leavenworth, Kansas.³⁷⁸

As reflected by the data in Appendix B, operational capacity of Army prison facilities are well below capacity, except for the Disciplinary Barracks at Fort Leavenworth. This data should be representative of the capacity levels of the military prisons of the other services. The data reflected in Appendices B-1 through B-4 indicate that almost all GCMs for the surveyed offenses of rape, aggravated assault, robbery, or drug result in a term of confinement. Appendix C shows that fewer cases are going to trial each year. The reduction in force and the reduction in court-martial cases should result in an even smaller number of confinees at all facilities in the future. As a result, military guidelines should not dramatically impact on prison population and certainly should not result in overcrowding except possibly at the Disciplinary Barracks.³⁷⁹ Military guidelines should be drafted to prevent the Disciplinary Barracks from becoming overcrowded, keeping in mind that the regional facilities could be used to confine prisoners with lengthy prison sentences. To accomplish this goal, the military's sentencing grid will need to eliminate long term confinement for those offenders where shorter confinement periods will just as readily serve the commander's disciplinary needs. The resultant "heartland" will accommodate prison capacity concerns primarily for long-term confinees while meeting the military's primary sentencing purpose.

G. DEPARTURES

Departures under the federal Guidelines can be used by the court to either increase or decrease punishment for an offender. Departures differ from adjustments because departures for the most part are not regulated³⁸⁰ and result after the sentencing bracket is determined.³⁸¹ Guideline departures may be based on the accused providing substantial assistance to the government³⁸² or the court finding other factors not adequately considered by the Commission in structuring the Guidelines.³⁸³

1. Substantial Assistance: Section 5K1.1

Substantial assistance departures permit the trial judge to incorporate a downward departure for an accused who assists the government in the investigation or prosecution of another person who committed an offense. These departures have been criticized because the government must file a motion to depart for substantial assistance before the court may depart.³⁸⁴ The GAO Report, the Commission Report, and the ABA study revealed discontent among judges and defense counsel with the Commission's decision to restrict the departure to the prosecutor's motion.³⁸⁵

To exacerbate the problem, circuit courts were split over whether they could review, or whether the district judge could inquire into, the government's refusal to raise the section 5K1.1 motion.³⁸⁶ Attempting to resolve the issue of review, the Supreme Court in *United States v. Wade*³⁸⁷ held that the trial court may review a refusal to file such a motion only if the court finds the refusal was based on an unconstitutional motive. The Court

also held that if the defendant, as in Wade's case, does not provide a factual based claim indicating unconstitutional motive, the defendant is not entitled to discovery, remedy, or an evidentiary hearing.³⁸⁸

In the military setting, substantial assistance should be determined by the convening authority upon advice of the SJA. The convening authority can then either require that government counsel file the motion or the convening authority can modify the adjudged sentence when he acts on the case.³⁸⁹ The right to file a section 5K1.1 motion should remain the sole discretion of the government. Neither the judge nor the defense counsel are in a position to know the value of the accused's assistance. Allowing the judge to bring a section 5K1.1 motion could disqualify the judge from hearing any case which may result from the accused's assistance. The defense counsel should also be precluded from raising a section 5K1.1 motion because the resultant litigation could compromise ongoing criminal investigations or pending criminal proceedings.

Though critics castigate the Commission for placing the decision to file section 5K1.1 motion in the hands of the prosecutor, prosecutors routinely file such a motion. The criticism really centers on the power transferred to the prosecutor by limiting the decision to the prosecutor's sole discretion. Because the convening authority reaps the benefits resulting from good morale and discipline in the unit, convening authorities would be in the best position to file for a

substantial assistance departure. By incorporating the convening authority's decision into the record through a motion or the SJA recommendation, the Court of Military Review will have a basis to review should the accused raise a *Wade* issue.

2. Factors Inadequately Considered: Section 5K2.0

Departure motions based on factors inadequately considered also receive much court attention. In section 5K2.0 of the Guidelines, the Commission stated that atypical factors not considered in the heartland are numerous and varied and the courts' should account for the extraordinary circumstances.³⁹⁰ However, when district courts depart because of an atypical case, the Commission has routinely followed the court's decision with a policy statement clarifying that such factors either were considered by the Commission in fashioning the heartland or are irrelevant to sentencing considerations.³⁹¹ This response by the Commission frustrates judges who are attempting to personalize sentences. These cases have typically involved those areas where Congress specified consideration was generally irrelevant; education, age, physical condition, family situation, and environment.³⁹²

The case law and articles in this area revolve around whether or not those areas which Congress identified as normally irrelevant should be considered relevant in some cases. Critics argue that failure to consider such personal characteristics reduces sentencing to a mechanical process where uniformity counterbalances proportionality so much that disparity results

from the excessive uniformity.³⁹³ To date Congress has not criticized or disapproved the Guidelines or any of the Commission's amendments. Of course policy statements which comprise the section 5K2.0 departure guidance are not subject to Congressional approval.³⁹⁴

3. Computation

A third problem in the area of departures concerns the amount of departure to apply in a given case. Courts are split on whether to base departures on offense levels or on incremental evaluations of the basis for departure. Departure computation for the criminal history category is specified in section 4A1.3. For section 4A1.2 departures, the circuits have followed the approach recommended in the federal Guidelines.³⁹⁵

In sections 5K1.1 and 5K2.0 departures, federal Guidelines provide no guidance to the trial judge concerning the degree to depart from the sentencing range.³⁹⁶ As a result, the circuits have devised varying formula in arriving at the appropriate departure.³⁹⁷ In *Williams v. United States*, the Court reviewed the reasonableness of a departure under section 4A1.3 for two prior convictions. In considering the validity of the prior convictions, the Court stated that reasonableness must be evaluated based on the Guideline factors and the trial judge's reason for departing. Though the case involved a section 4 departure, perhaps the reasonableness test articulated in *Williams* will resolve the resultant disparity from application of the varied approaches to sections 5K1.1 and 5K2.0 departures.³⁹⁸

Reasons for departure outside of the range must be articulated by the court.³⁹⁹ The circuits vary on the form of that reasoning. Some circuits require specific findings appended to the record, while other circuits have held that oral records are adequate.⁴⁰⁰ To assist in evaluating departure practices and adjusting a military guideline system, military judges should be required to make specific findings for their basis for departure outside of the sentencing range and append them to the record. Departures under sections 4 and 5 should be adopted by a military guideline system to provide for consideration of unique situations not contemplated in the guidelines.⁴⁰¹

H. APPELLATE WORKLOAD

For the first time federal appellate courts are actively involved with sentence review. Not surprisingly this new right has impacted on the workload of practitioners, district courts, and circuit courts. The GAO Report and ABA study found that not only the number of appeals, but the time to review the appeals, increased under the Guidelines.⁴⁰²

1. Circuit Courts

Appellate courts may remand a case in which trial courts fail to follow or misapply the Sentencing Reform Act or the Guidelines, or when trial courts implement an unreasonable departure. If the issue involves an unreasonable downward or upward departure, the circuit court must provide specifics reasons for its ruling to the district court regarding appropriate corrective action.⁴⁰³ Although circuit courts cannot

change a departure decision, they can mandate that district courts correct the erroneous ruling, even if the defendant receives increased punishment.

2. Military Courts

Adoption of the appellate review rule would have limited impact on military appellate workloads since automatic appeal to Court of Military Review already exists for most GCM cases.⁴⁰⁴ Any appreciable increase in the workload of the military appellate structure would counterpoise with the downward trend in courts-martial shown by the data reflected in Appendix C. Appendix C also shows the number of cases appealed under current law and the small percentage of those cases which are granted review by the Court of Military Appeals.⁴⁰⁵ In the military, the responsibility for reviewing assigned records for legal error rests with trial and appellate defense counsel.

The role of the convening authority and SJA in the review process has changed significantly since 1950. They no longer review records for legal error. Legislative history indicates three reasons for the change: increased involvement of attorneys in court proceedings, the complexity of legal review and the potential for creating errors in an errorless trial, and the duplicative review by Court of Military Review.⁴⁰⁶ The present role of the convening authority in the post-trial process, as clemency authority, lends itself to resolving one of the primary criticisms of the Guidelines: lack of adequate consideration of

education, family, value to society, and other personal characteristics within the sentencing table.

The convening authority already receives post-trial submissions from the accused pertaining to personal characteristics and perceived legal error prior to approving and executing the sentence. The convening authority also receives personal data and other relevant conduct factors⁴⁰⁷ from the SJA as part of the SJA recommendation. This places the convening authority in the opportune position to factor in additional departures not allowed or considered at court to individualize the sentence in extraordinary cases.

By following the reasonableness test enunciated in *Williams v. United States*, in those rare cases requiring downward departure, the convening authority's clemency power should introduce proportionality into a uniform sentencing grid without affecting disparity. In testimony before the committee regarding the authorization of suspension powers to either the judge or members, Mr. Taft asserted that only the convening authority is in a position to evaluate the impact of the sentence on the accused, his command, and society.⁴⁰⁸ If the authority to suspend sentences rests within the convening authorities power because of his unique knowledge, the authority to depart should also rest with the convening authority. Because of the military judges opportunity to evaluate the case as it is presented, the military judge should also be authorized to award departures. The data in Appendix A indicates the convening authority rarely grants

sentencing relief absent a pretrial agreement. If this trend continues after implementation of military guidelines, departures ordered by the convening authority should be minimal. To remove the convening authority from the review chain completely would be a radical measure with the potential to undermine unit discipline.⁴⁰⁹

The other aspect of Guideline appeals, government appeals for unreasonable downward departures, would introduce a new concept to military law. Currently, government counsel may make a limited appeal of judicial rulings effecting the merits of the case, but has no authority to appeal an unreasonable sentence or any other aspect of the presentence hearing.⁴¹⁰ In line with the other arguments supporting convening authority control of charging, member selection, and review, authority to appeal an unreasonable downward departure should rest with the convening authority. If the convening authority believes the adjudged sentence does not serve the best interests of discipline in his command, he should be permitted to file an expedited appeal to the Court of Military Review.⁴¹¹

V. RECOMMENDED CHANGES FOR A GUIDELINE SYSTEM

Many of the practices addressed by the legislation [MJA of 1983] were adopted at a time when lawyers were not required participants in much of the court-martial process....When the code was later modified, requiring lawyer participation at all levels of the court-martial

process, these changes were merely grafted onto the old essentially non-lawyer system.

*Brigadier General Tiernan, USMC, SJA to the Commandant*⁴¹²

In drafting military guidelines, the military committee should use the experience of the Commission as well as state experience which in some areas may be a more accurate reflection of military law. As the Commission has discovered, changes should not only be evolutionary, but non-radical. The recommended changes may appear radical to military attorneys, but they reflect the minimal changes necessary to implement a Military Sentencing Guidelines. A two tier court-martial system and judge alone sentencing for all non-capital courts-martial will decrease disparity and will allow the commander to efficiently and effectively administer military justice.

A. Statutory Changes

Within the UCMJ major changes need to be made to articles on sentencing, pretrial procedures, trial procedures, post-trial procedures, and punitive articles. UCMJ changes should parallel sections 991-98 of title 28, U.S. Code, as well as applicable language from the Sentencing Reform Act. As in the federal system, a full-time military committee not only needs to work on implementation, but the constant, evolutionary changes to the military guidelines once guidelines are enacted.

B. Regulatory Changes

The Manual for Courts-Martial of 1984 requires changes in several areas. The Rules for Courts-Martial need to be modified to reflect the role of the probation officer, his duties and responsibilities. The different requirements on the military judge, counsel and the convening authority will need to be specified. The sections involving witness production and evidence in sentencing should be changed to reflect a system modeled after the federal system. Review procedures should reflect the different roles of the convening authority and the military appellate courts. The section on motions requires modification to provide for the government substantial assistance motion, defense and government motions for departures, and government motion for expedited review upon pronouncement of sentence. As changed, the Rules for Courts-Martial should correspond with many of the Federal Rule of Criminal Procedure, such as Federal Rule of Criminal Procedure 11 and 32. The Rules for Courts-Martial also need to account for a post-conviction confinement hearing and a temporary confinement facility.

Changes to the Military Rules of Evidence would be limited, partly due to the adoption of the Federal Rules of Evidence in 1980.⁴¹³ Evidentiary changes should reflect relaxed Military Rule of Evidence to facilitate the use of the presentence report and other documentary hearsay evidence during sentencing. The rules should reflect the non-adversarial nature of the guideline sentencing hearing.

The punitive articles should parallel chapter 2 of the federal Guidelines. The section should have offenses grouped by generic offense categories similar to Guideline groupings. The groupings should be considerably less than the 19 Guideline categories and 43 base offense levels because of the close relationship of the various punitive articles, the smaller number of military categories, and the absence of jurisdiction to try organizations. A generic category for military specific offenses needs to be added. The punitive articles should also reflect any bases for adjustments. Adjustments should be keyed to the common factors found by the committee when reviewing records of trial that enhance court-martial sentences.

Appendices of the Manual for Courts-Martial with sentence related forms and the court-martial guide would require modification to account for the new sentencing procedures. At the same time a new appendix containing the military's sentencing grid should be added. An additional new appendix should include modified Guideline worksheets and a sample presentence report.

C. Abolish SPCM

A change essential to adaptation of the military justice to military guidelines, involves changing the military court-martial system from three levels to two. Judge advocates, scholars and citizens have attempted to change or drop summary courts-martial and special courts-martial beginning with the Elston Act in 1948. The military section of the ABA asserted that lower two levels of courts-martial are susceptible to the greatest abuse due to the

close, unsupervised involvement of the junior commander with all phases of the court-martial process.⁴¹⁴

The obvious benefits to a guideline system without SPCM involve maintaining only one criminal justice system prosecuting felony-type offenses. If SPCM are kept, then the Manual for Courts-Martial would have to reflect separate trial procedures or incorporate the jurisdictional maximum and lesser procedural protection into the guidelines. In either case, SPCM would undoubtedly become a source of hidden disparity due to pre-charging decisions during plea negotiations.

D. Abolish Member Sentencing

The other recommended action that should be considered essential, involves removing members from the presentencing hearing and sentencing decision. Appendix A shows that members varied greatly in punishments adjudged for similar offenses. The data show that sentences adjudged by members cluster around the minimum and maximum punishments instead of the average punishment. Court experience and review of case law reveals that members usually lack the experience to cut through the fluff in counsels' arguments, and normally either do not know or do not consider the command's disciplinary requirements.

In testifying before the committee, Judge Everett stated that abolishing member sentencing would conform the military sentencing process to ABA standards for Judicial Administration. He noted that removing members from sentencing would expedite sentencing procedures, eliminate opportunity for legal error in

presentencing instructions, and introduce consistency and predictability into sentencing.⁴¹⁵

Some may question the ability of military judges to predict the community's disciplinary needs. The Honorable Elwood Hollis in a statement before the House Armed Services Committee observed that the military judiciary are a highly professional and competent element of the military justice system.⁴¹⁶ The data used to develop Appendix A indicate judges imposed more uniform sentencing than members. Additionally, judges hear a lot more cases than any member ever would hear. That experience would correspond to a more effective sentencing procedure.

In a recent survey conducted by a military graduate course attorney, several military attorneys, SJAs, and convening authorities support removal of members from the sentencing process. Most of those surveyed who support eliminating members from the sentencing phase of the trial qualified their answers by requiring some type of guideline system.⁴¹⁷ Removing members would eliminate potential legal error, while guidelines would control judicial discretion.

If members must remain in the sentencing process, then they should function in only a limited role. Members while acting as fact finders during the merits could learn a lot about the accused and the case. In deciding guilt, issues involving intent, degree of culpability, and injury, would normally be resolved by the members during deliberations. From those findings of fact, members could determine the initial sentence

within the 25% sentencing range and advise the judge on possible grounds for departure. Their recommendations should go to the judge and be appended to the record as an appellate exhibit. The members could then be excused. The court would be required to complete the presentence report, determine if any other evidence was needed, determine the appropriateness of departure, and resolve any objections by counsel.

Other changes could include restricting the use of pretrial agreements,⁴¹⁸ removing the SJA and convening authority from the post-trial review process, and introducing probation as a sentencing option. None of these changes are essential to guideline implementation and would exponentially increase the complexity of sentencing guidelines. When working on guidelines, the military committee should concentrate its emphasis on creating a system to enhance discipline.

VI. CONCLUSION

You see...I have an impression - in talking to military-justice men that they are so steeped in their military-justice training that they have lost sight of the practicality of getting rid of...a lot of military procedures that they can dispense with and substitute...procedures of our civilian criminal courts.

*Senator Wayne Morse, Senate Armed Services Comm.*⁴¹⁹

The sentencing system in the military, like the federal pre-guidelines system and many other state systems, is based on antiquated sentencing models built to create a better man through prison reformation. Instead of a better man, reformationist got a rudderless criminal justice system. Review of decisions by the Court of Military Appeals and legislative history since enactment of the MJA of 1950 illustrate a stagnant military justice system. Changes have been made to military justice in many areas, but the old corps continues to cling to the vestiges of an archaic system of laws based on outmoded concepts, technologies, and missions.

The Commander is no longer isolated in the field. Field communications and transportation allow for transfer of legal documents and personnel to and from remote locations, and a mobile, sophisticated smaller armed forces has little room for convicted servicemembers on the front lines or any other place in the ranks. The armed forces has become highly selective in recruiting and retention; vying for the best. The military justice system should emulate the new military ideology by revamping a justice system designed for modern warfare.

The Congress spent years of study, research, and debate to develop an updated federal criminal system. The Commission required three years of intensive study, research, and debates to implement Congress' new federal criminal system. The voluminous materials, numerous hearings, and multitude of witnesses considered by the Commission contributed to one of the most comprehensive, radical changes to criminal justice in the history

of the United States government. Such a system, which effects every facet of criminal justice, cannot hope to please everyone. Critics abound, but studying their criticisms reminds me of the fable about the fox and the sour grapes. Just like the complaining fox, much of the criticism results from not being able to reach that perfect system. Praise and criticism of the Guidelines often encompass the same issues, but seen from different perspectives. Some critics seem to be complaining just because it is their right to complain.

The Guidelines do have problems, many of which were addressed in this paper. When the military reorganized into the Department of Defense, implemented the MJA of 1950, went to the volunteer army in 1972, and adopted the federal rules of evidence in 1980, many military and civilian leaders criticized each of those changes. Though seemingly radical at the time, those changes resulted from a shift of philosophical ideals within society. Each change introduced unique problems both real and conceived into the military machine. With each change military discipline and leadership resolved the problems and a better military emerged.

In adopting or creating a military sentencing guideline system, the military has not only its discipline and leadership, but all of the knowledge and experience of the people who have been involved in creating the federal and state sentencing guidelines. Not one critic of the Guidelines has suggested that guidelines are not the answer; criticism focuses on the approach

taken by the Commission in drafting and amending the Guidelines and the complexity of the Guidelines.

Neither Congress nor the public, the prime catalysts of the Guidelines, have shown any dissatisfaction with the harshness, rigidity, and loss of discretion and control by the trial judge. Some could easily argue that these weaknesses identified by practitioners and scholars exemplify the goals of the Sentencing Reform Act. Congress and the public wanted judicial discretion removed, harsher sentences, and truth-in-sentencing. Many complaints illustrate one of man's basic flaws, resistance to change. Close analysis of arguments against the Guidelines and the Commission's work reveals the lingering remnants of reformation in the hearts and minds of many of the critics.

Guidelines for military sentencing will reduce the disparity in sentencing, create honest sentences, and most importantly, enhance military discipline. Those guidelines patterned after the federal system must be modified to accommodate the unique needs of the military. A permanent evolutionary military committee can ensure that the needs of the military commander are best served, by holding open debate and actively reviewing the work of previous guideline commissions. This committee must strive to work more closely during all phases of guideline development with those who will be affected by the new system.

By paralleling the federal approach to sentencing, the military justice system will become more efficient and just. Bifurcated hearings will result in reasoned sentencing decisions

instead of sentencing decisions rushed because dinner time is near or the lateness of the hour. If member sentencing is abolished, sentencing decisions will be made by a judge who has had time to reflect on his decision, with the assistance of counsel, and a probation officer.

A sentencing range should eliminate manipulation of the docket for a more favorable judge. Judges will be provided all the information to arrive at an appropriate sentence for the accused within the confines of the purpose for military justice, discipline. An accused will know exactly how much time he will spend in jail when his sentence is announced.

Federal sentencing guidelines do not and should not apply to the military. Military justice requirements differ from the requirements of the federal criminal justice system. Guidelines for the military must meet military requirements. The military can ensure military guidelines are adapted to military needs by taking an active role in guideline development. Guidelines are a means of ensuring justice and justice is what the UCMJ, the Manual for Courts-Martial, and the military justice system are all about.

1. Condensed from the following passage, these remarks are quoted in Nagel, *infra* note 3, at 891 n.42.

Nothing is more dangerous than the common axiom that one must consult the spirit of the law. This is a dike that is readily breached by the torrent of opinion Everyone has his own point of view, and everyone has a different one at different times. The spirit of the law, then, would be dependent on the good and bad logic of a judge, on a sound or unhealthy digestion, on the violence of his passions, on the infirmities he suffers, on his relations with the victim, and on all the slight forces that change the appearance of every object in the fickle human mind. Thus we see the fate of a citizen change several times in going from one court to another, and we see the lives of poor wretches are at the mercy of false reasonings or the momentary churning of a judges' humors. The judge deems all this confused series of notions which affect his mind to be a legitimate interpretation. Thus we see the same court punish the same crime in different ways at different times because it consulted the erroneous instability of interpretations rather than the firm and constant voice of the law. . . .

. . . .

. . . any confusion arising from the rigorous observation of the letter of the law cannot be compared with the disorders that spring from interpretation.

2. UNITED STATES SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINE SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING, DECEMBER 1991, at 1 [hereinafter 'COMMISSION REPORT'].

3. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990); *see generally*, 28 U.S.C. §§ 991-998.

4. Nagel, *supra* note 3, at 884.

5. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) [hereinafter Sentencing Reform Act] (codified at 18 U.S.C. chs. 227, 229, 232; 28 U.S.C. ch. 58). Originally introduced in the 95th Congress under the sponsorship of Senator McClellan and Senator Kennedy, S. 1437 survived five years of Congressional debate, modification, and analysis. On October 4, 1984, the 98th Congress passed a version of S. 1437, as Title II of the Sentencing Reform Act. President Reagan signed the bill into law on October 12, 1984.

6. 28 U.S.C. § 991.

7. *Id.*

8. UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES AND POLICY STATEMENTS, APRIL 1987, at 1.1 [hereinafter GUIDELINES OF 1987];

see also, UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1993), at 1-2 [hereinafter GUIDELINES].

9. See GUIDELINES, *supra* note 8.

10. UNITED STATES GENERAL ACCOUNTING OFFICE, UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL COMMITTEES; SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED, AUGUST, 1992, p. 17 [hereinafter GAO REPORT]; see also, Note, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED AUGUST 1992 (GAO/GGD-92-93), 5 FED. SENT. R. 143 (1992) (providing excerpts from GAO REPORT).

11. See, e.g., Michael Tonry, *GAO Report Confirms Failure of U.S. Guidelines*, 5 FED. SENT. R. 144, 144 (1992); Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 100 YALE L. J. 1681, 1682 (1992); Theresa Walker Karle and Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 EMORY L.J. 393 (Spring 1991); Nagel, *supra* note 3, at 883; *Results of Survey on the Impact of the U.S. Sentencing Guidelines on the Federal Criminal Justice System*, 1992 A.B.A. CRIM. JUST. SEC. RPT. [hereinafter ABA Survey].

12. See, e.g., Avern Cohn, *The General Accounting Office Report to Congressional Committees on Sentencing Guidelines--A Reaction*, 5 FED. SENT. R. 156 (1992); Stephen J. Schulhofer, *Excessive Uniformity--And How to Fix It*, 5 FED. SENT. R. 169 (1992); Marc Miller and Daniel J. Freed, *Editors' Observations Amending the Guidelines*, 4 FED. SENT. R. 307 (1992); Michael

Tonry, *Salvaging the Sentencing Guidelines in Seven Easy Steps*, 4 FED. SENT. R. 355 (1992).

13. Nagel, *supra* note 3, at 899-900.

14. See, e.g., *supra* notes 11 and 12; see also LEXIS and WestLaw Federal Sentencing Libraries.

15. Military Justice Act of (Uniform Code of Military Justice) 1950, Pub. L. No. 506, ch. 169, 64 Stat. 107, (originally codified at 50 U.S.C. § 551 (1952); later codified at 10 U.S.C. § 801).

16. S. REP. NO. 486, 81st Cong., 1st Sess. 3 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, at 1229, 1231 (1950).

17. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before Subcomm. No. 1 on Armed Services*, 81st Cong., 1st Sess. 565, 599-600 (1949) *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, at 33, 67-68 (Statement of Prof. Edmund M. Morgan, Jr., Chairman of committee appointed by the Secretary of Defense to create one military justice code).

18. National Security Act of 1947, Pub. L. No. 253, 61 Stat. 495 (creating the National Military Establishment), *amended by* National Security Act Amendments of 1949, Pub. L. No. 216, 63 Stat. 578 (renaming National Military Establishment the Department of Defense). For an excellent historical analysis of the development of the Office of the Secretary of Defense see

STEVEN L. REARDEN, *THE FORMATIVE YEARS 1947-1950* (Alfred Goldberg, ed., 1984).

19. Major [Lieutenant Colonel] Russell W. G. Grove, *Sentencing Reform, Toward a More Uniform, Less Uninformed System of Court-Martial Sentencing*, 187 *THE ARMY LAW.* 26, 35-36 (1988).

20. S. REP. NO. 225, 98th Cong., 1st Sess. 38-39 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3221-3222.

21. Grove, *supra* note 22, at 27; Telephone interview with Thomas S. Markiewicz, Chief, Clemency, Corrections, and Review Division, U.S. Air Force (Feb. 12, 1993) (served as a panel member to discuss application of U.S. Sentencing Guidelines to courts-martial). *See generally*, Major Kevin Lovejoy, *Abolition of Member Sentencing* (1993) (unpublished L.L.M. thesis, The Judge Advocate General's School, Charlottesville, VA).

22. Lieutenant Colonel Craig S. Schwender, *Sentencing Guidelines for Courts-Martial: Some Arguments Against Adoption*, 188 *THE ARMY LAW.* 33, 33-34 (August 1988). *See generally*, Lovejoy, *supra* note 21.

23. *A Trial Judge's Reflections on Departures From the Federal Sentencing Guidelines*, 5 *FED. SENT. R.* 6 (1992) (Writing in criticism of the restrictive approach used by the Commission in handling trial court departures for personal characteristics).

24. *Mistretta v. United States*, 488 U.S. 361, 363 (1989); Nagel, *supra* note 3, at 897.

25. *Mistretta*, 414 U.S. at 362-63.
26. See Nagel, *supra* note 3, at 887-88.
27. *Id.* at 888.
28. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) of which Chapter II is the Sentencing Reform Act of 1984, *supra* note 5.
29. Nagel, *supra* note 3, at 893 n.62.
30. *Id.*
31. *Id.* at 893-94.
32. Act of June 25, 1910, ch. 387, 36 Stat. 819 (creating boards of parole). Later unified, the Parole Board officially became the U.S. Parole Commission under the Parole Commission and Reorganization Act, Pub. L. No. 94-223, 2, 90 Stat. 219 (1976) (codified at 18 U.S.C. § 4202).
33. *Mistretta v. United States*, 488 U.S. 361, 365 (1989); Nagel, *supra* note 3, at 895.
34. Judge Bruce M. Selya and Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 4-5 (1991); 18 U.S.C. § 4205(a) (1988).
35. 337 U.S. 241, 247-48 (recognizing the role of the probation system in fixing punishments).
36. Comprehensive Crime Control Act of 1984, *supra* note 28. (Repealing 18 U.S.C. ch. 311, thereby removing jurisdiction from

Parole Commission for offenders sentenced under the Guidelines.) This action was subject to congressional reinstatement upon review of the GAO REPORT, *supra* note 10.

37. See generally S. REP. NO. 225, *supra* note 20.

38. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 1 (June 18, 1987) [hereinafter SUPPLEMENTARY REPORT]; Nagel, *supra* note 3, at 895.

39. SUPPLEMENTARY REPORT, *supra* note 38, at 1 n.7, 2.

40. *Id.* at 2-3.

41. *Id.* at 3; Judge Marvin L. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1 (1972). Nagel, *supra* note 3, at 899 n.97 writes that Senator Edward Kennedy an original co-sponsor of Sentencing Reform Act "has referred to Judge Frankel as 'the father of sentencing reform.'"

42. Frankel, *supra* note 41, at 50-54.

43. SUPPLEMENTARY REPORT, *supra* note 38, at 3.

44. ANTHONY PARTRIDGE AND WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (Federal Judicial Center ed., 1974) (A study of all district judges in the Second Circuit). The authors sent twenty real presentence reports and ten manufactured case reports with one relevant factor changed to all the judges in the Second Circuit. Out of 1465 mailings, the authors analyzed 1442 responses. They found substantial disparity in the first twenty cases with disagreement

the apparent norm. In the last ten cases, what the probation report recommended, whether a drug addict, whether plead guilty, criminal record, Youth Corrections Act eligible (25 years old or younger), or white-collar crime did not reduce disparity. Criminal record was the only factor which consistently elicited more severe sentences. The authors also determined by analysis that sentencing councils or sentencing classes did not reduce disparity among council members or class attendees.

45. Freed, *supra* note 11, at 1685 n.7; SUPPLEMENTARY REPORT, *supra* note 38, at 3-4.

46. PIERCE R. O'DONNELL ET AL., TOWARD A JUST EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977). The Commission's Supplementary Report notes that two years prior to Yale's published study the federal parole system had implemented parole guidelines based on a pilot program started in 1972. Congress authorized the pilot program to try to control a rudderless federal judicial system. When Congress saw that parole guidelines were not the answer, that they came too after-the-fact, a push came to extend guidelines fashioned after the parole guidelines to federal sentencing. However, with the introduction of sentencing guidelines Congress saw the Parole Commission as outdated and unnecessary.

47. Karle and Sager, *supra* note 11, at 394.

48. 28 U.S.C. §§ 991-998.

49. 28 U.S.C. §§ 991, 994. Certain provisions of numerous other statutory titles are also effected by the Guidelines (tits. 7, 8, 12, 15-17, 19-22, 26, 29, 31, 33, 41-43, and 45-50).

50. Nagel, *supra* note 3, at 66.

51. Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L. J. 1773, 1773-74 (1992) (first director of Minnesota sentencing commission). When the Guidelines were enacted, three states had a guidelines system in place. Only one of those state guidelines systems, Minnesota, had a significant history behind it. As of this date, 18 states have incorporated a guidelines system of some form into their criminal codes. Several other states which do not have Guidelines have some form of mandatory minimum sentencing which reduces judicial discretion for at least some offenses.

52. *Id.* at 1774 n.7.

53. Congress provided for seven voting members and one non-voting member as the Commission. Each member would, with certain restrictions, be selected by the President with the approval of Congress. 28 U.S.C. § 991. (Three members must be federal judges, no more than four from the same political party, the Att'y Gen. or his designee shall be a nonvoting member).

The initial terms of office were staggered with successors appointed for six-year terms. 28 U.S.C. § 992. Two members and the Chairman serve six years, three members serve four years, and remaining two members serve two years. One of the members

appointed Chairman by the advice and consent of Congress is responsible for the operation and administration of the Commission. To assist the Chairman in the Commission's routine requirements, the Chairman may utilize a Staff Director to execute the administrative functions of the Commission. These functions include the hiring of other staff and the administrative requirements to prepare an annual report for review by the Judicial Conference of the United States, the Congress, and the President.

54. Nagel, *supra* note 3, at 901. Congress envisioned a system where Guidelines would structure the judge's discretion in sentencing while accommodating individual sentencing requirements. Congress only restricted a judge's discretion to comport with Congress' goals, purposes, and directives, for sentencing. To assist the Commission in developing restrictive Guidelines, Congress provided specific directives for the Commission. These directives included:

- 1) Type of punishment the court should award; a fine, a sentence of probation, or imprisonment. Quantities for specific offenses as well as whether multiple prison terms should run concurrently or consecutively. Policy statements regarding application of the Guidelines.

- 2) Sentencing ranges consistent with all pertinent provisions of title 18, U.S. Code where the maximum term of imprisonment, would not exceed the minimum by more than 25% or

six months, whichever was greater. If the minimum term is 30 years or more, life imprisonment may be the maximum.

3) Through guidelines and policy statements offense categories which, when relevant, account for the grade of the offense, aggravation or mitigation, nature and degree of harm caused by the offense, public views on seriousness of the offense, public concern resulting from the offense, deterrent effect of the sentence, and current incidence of the offense in the community and the Nation.

4) Offender categories which, when relevant, account for age, education, vocational skills, mental and emotional condition, physical condition, including drug dependence, previous employment records, family ties, community ties, role in the offense, criminal history, and degree of dependence on criminal activity. Ensure Guidelines are nondiscriminatory as to race, sex, national origin, creed, and socioeconomic status.

5) In recommending imprisonment, general inappropriateness of considering education, vocational skills, employment record, family ties, and community ties.

6) Sentences that are certain and fair while maintaining ability to account for individual characteristics.

7) An accounting for the nature and capacity of prison facilities and services and recommend necessary changes to the prison system. Formulate Guidelines to minimize the likelihood of prison overcrowding.

8) Sentences at or near the maximum term if eighteen or older and convicted of a felony for a violent crime or drug offense, or previously convicted for two or more felonies involving violence or drugs.

9) Sentences to a substantial term if previously convicted of two or more felonies committed on separate occasions, or shows defendant to be reliant upon or involved in serious criminal conduct.

10) Break for first offender, unless convicted of a serious offense. Any offender who commits violent crime resulting in serious bodily injury should generally be imprisoned.

11) Inappropriateness of imprisoning for rehabilitation or reformation.

12) Appropriateness of incremental penalties for multiple offenses and inappropriateness of consecutive terms of imprisonment for conspiracy and solicitation and the object crime.

13) Sentences which accurately reflect seriousness of offense. Determine average sentence prior to CCA, and average imprisonment actually served. Using those averages as a guide, develop range to comport with section 3553 (a)(2) of title 18, United States Code.

14) Appropriateness of imposing lower sentences, including lower than statutory minimums for substantial

assistance in investigation or prosecution of another person who has committed an offense.

15) Periodic review and revision of guidelines and consultation with individuals and agencies of the federal criminal justice system.

16) Directive to submit amendments or modifications by May 1 of each year. Amendments take effect on November 1 or 180 days after submission whichever occurs first without Congressional action.

17) Provisions to conduct a joint analysis with Bureau of Prisons on Federal prison problems.

18) Recommended changes to maximum penalties.

19) Provision to consider defendant petitions requesting modification of guidelines which affect defendant's sentence.

20) In policy statements, basis for sentence reduction, coinciding with examples for sentence modification under section 3582(c)(1)(A) of title 18, U.S. Code. Rehabilitation alone is not considered extraordinary or compelling.

21) If term of imprisonment reduced due to Guidelines, specific method to the lower sentence of offenders already incarcerated for the same offense.

22) Policy statements which limit consecutive terms for punishing both a general offense related to an object offense and the object offense.

23) Requirement for judges shall submit separate sentencing reports for each case including all factors considered relevant by Commission or made relevant by the Guidelines.

24) Compliance with section 553 of title 5, U.S. Code (publication in Federal Register and public hearing procedure).

55. Not only did these powers extend to housekeeping functions, they provided that the Commission could gather data and testimony from other federal agencies or other sources. Congress directed the Commission to act as a watchdog over all facets of the federal sentencing system. Additionally, the Congress placed the Commission in charge of training programs to implement the changes in the field. Finally, Congress directed that other federal agencies assist the Commission in accomplishing its mission to include the use of personnel, equipment, and services. 28 U.S.C. § 995.

The Honorable Samuel A. Alito, Circuit Judge for the Third Circuit, echoed the thoughts of many critics who objected to the Commission's domineering attitude when he stated "Let me conclude with a small point of personal interest....[T]he Commission, through the amendment process, is now performing...the same role the Supreme Court plays with respect to...resolving circuit conflicts and generally keeping the courts of appeals in line....As far as I am aware, no other federal agency--in any branch--has ever performed a role anything like it [emphasis

added]." *Reviewing the Sentencing Commission's 1991 Annual Report*, 5 FED. SENT. R. 166 (1992).

56. Weinstein, *supra* note 26, at 6.

57. Nagel, *supra* note 3, at 916, 921.

58. SUPPLEMENTARY REPORT, *supra* note 38, at 11. In arriving at a final draft, the Commission distributed 5,500 copies of its September 1986 preliminary draft and a similar number of copies of its January 1987 revised draft. After each distribution, the Commission held three sets of regional meetings, 13 in total, for public comment.

As noted by Commissioner Nagel, the Commission takes exception to the comments of Professor Parent and others that the Commission was not interested and did not pursue open debate. These critics assert the Commission was not concerned with sincere discussion and debate, but only presented a facade of interest while secretly and individually working on the guidelines. *See generally* Parent, *supra* note 51.

Critics of the proposed Guidelines garnered a modicum of support from Congress at the eleventh hour in an attempt to halt implementation of the Guidelines. The effort to delay the Guidelines failed and the first federal sentencing guidelines took effect on November 1, 1987. Nagel, *supra* note 3, at 939.

59. GUIDELINES, *supra* note 8, at 4-10 (Commission in a policy statement said other specific problems concerned

departures, plea agreements, probation, multi-count convictions, and regulatory offenses).

60. Nagel, *supra* note 3, at 898, 916-20; SUPPLEMENTARY REPORT, *supra* note 38, at 13.

61. ANDREW VON HIRSCH, STRUCTURING SENTENCING DISCRETION: A COMPARISON OF TECHNIQUES 5 (1988); *See also* Dissenting View of Commissioner Paul H. Robinson on the Promulgation of the Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121 (1987) [hereinafter Dissenting View]. Commissioner Robinson argued that congressional mandate required the Commission articulate a single sentencing purpose. He agreed with Professor Von Hirsch that "just deserts" was an appropriate punishment theory for federal guidelines. Under "just deserts" a person is punished for the incremental harm done. Such a theory requires consideration of a myriad of factors greatly complicating application. Nagel, *supra* note 3, at 914.

62. Nagel, *supra* note 3, at 898, 916 n.197. *See generally* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968) advocating deterrence, prevention, and reform as punishment goals. His approach formed a basis for the utilitarian theory which advocates crime control through either deterrence of others or incapacitation of the defendant.

63. Nagel, *supra* note 3, at 916, 922. *See generally* Nagel at 916 n.197 for an excellent commentary about the interplay

between Commissioners and the public. *But see Parent, supra* note 51, at 1775.

The four sentencing purposes according to Congress at section 3553, of title 18, U.S. Code, were designed:

- [1] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- [2] to afford adequate deterrence to criminal conduct;
- [3] to protect the public from further crimes of the defendant; and
- [4] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Not only did the Commission's approach to developing a sentencing purpose seem to satisfy Congressional intent, but it allowed for universal acceptance. Judges could apply the principle or principles relevant for that particular offender for that particular crime. SUPPLEMENTARY REPORT, *supra* note 38, at 15, 16. A compromise for all intents and purposes between "just deserts" and utilitarian theories, the four sentencing principles reflected the reality of sentencing.

64. Nagel, *supra* note 3, at 925.

65. *Id.*

66. GUIDELINES, *supra* note 8, at 4-5; Nagel, *supra* note 3,

at 925-27 (The Commission feared that a pure charge conviction system would put too much power in the hands of the charging authority, the prosecutor). See also Selya and Kipp, *supra* note 34, at 9, 10.

67. See *supra* note 66.

68. SUPPLEMENTARY REPORT, *supra* note 38, at 16, 17; Selya and Kipp, *supra* note 34, at 11. The Commission departed substantially from past averages in those punishment areas where Congress had directed higher sentences: career offenders, drug offenses, crimes of violence, and economic crimes. As a result, the possibility for incarceration increased dramatically. For example, many previous economic crimes resulted in non-incarcerative sentences. The Commission believed this past practice was inappropriate based on Congress' guidance. SUPPLEMENTARY REPORT, *supra* note 38, at 16-19, and for general information on data concerning sentencing practices, ch. 4; Nagel, *supra* note 3, at 931-32.

As a result, the Commission drafted the Guidelines to make prison more certain. Some Commissioners wanted more and some less weight placed on past sentencing practices, but in the end compromise prevailed. See, e.g., Dissenting View, *supra* note 64, at 18,121 (where Commissioner Robinson alleges that the Commission relied on past practices too much in shaping the guidelines).

69. Congress defined disparity as occurring when two like

defendants convicted of the same offense received different sentences.

70. Nagel, *supra* note 3, at 934.

71. *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

72. See generally GUIDELINES, *supra* note 8 (reflecting the amount of work necessary to handle the Commission's responsibilities).

73. Nagel, *supra* note 3, at 905.

74. 488 U.S. 361. The United States Attorney indicted the petitioner, John Mistretta and another person for selling cocaine. The district court rejected Mistretta's motion to have the Guidelines ruled unconstitutional. Additionally, Mistretta argued that the Commission received an impermissible delegation of Congress' lawmaking powers. Mistretta also argued that the Commission, as a part of the Judicial Branch, but working for the Legislative Branch, violated the separation of powers doctrine. After the district court denied Mistretta's motion, he plead guilty and received his sentence. After trial, both Mistretta and the government requested review by the Supreme Court.

75. *Id.* at 379.

76. *Id.* at 397.

77. *Id.* at 404.

78. *Id.* at 411.

79. *Id.* at 412.

80. See, e.g., *United States v. Bolding*, 876 F.2d 21 (4th Cir. 1989) (holding that Sentencing Reform Act and Guidelines do not violate constitutional guarantee of due process); *United States v. Brittman*, 872 F.2d 827 (8th Cir. 1989) (holding that Guidelines do not eliminate sentencing judge's discretion); *United States v. Harris*, 876 F.2d 1502 (11th Cir. 1989) (holding Congress has authority to impose sentencing restrictions, and since the Supreme Court has ruled mandatory minimum sentences do not deprive defendant of an individualized sentence, Guidelines do not violate due process).

81. Selya and Kipp, *supra* note 34, at 6-8.

82. Tonry, *supra* note 12. GUIDELINES, *supra* note 8, at 11.

83. Pamela B. Lawrence and Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline 1B1.3*, 4 FED. SENT. R. 330 (1992). Study conducted at the request of the Federal Judicial Conference's Committee on Criminal Law due to observed and reported problems with application of "relevant conduct" to determine appropriate Base Offense Level. Typical drug cases with varying factors normally considered relevant were evaluated by 46 probation officers. In completing Guideline Sentencing Worksheet A, the base offense levels for the same facts varied greatly among all of the hypothetical defendants. As a result of this study, the Commission amended section 1B1.1 to ensure offense levels are more closely tailored to individual culpability.

84. Nagel, *supra* note 3, at 922. Commissioner Nagel explains that the first guideline draft was too rigid. In attempting to correct the problem the Commission overcompensated and the resultant draft published in January 1987 was so flexible it did not comply with the statute.

85. 18 U.S.C. § 3742 *reprinted in* GUIDELINES, *supra* note 8, App. B, at 434.

86. *Mistretta v. United States*, 488 U.S. 361, 364 (1989).

87. GAO REPORT, *supra* note 10, at 168, and tbl. V.5;
COMMISSION REPORT, *supra* note 1, at vol. I, pt. I.

88. Federal Sentencing Guidelines, BNA Criminal Practice Manual, No. 64, 141:201 (1993); JEFRI WOOD AND DIANE M. SHEEHY, GUIDELINE SENTENCING: AN OUTLINE OF APPELLATE CASE LAW ON SELECTED ISSUES (Federal Judicial Center ed., 1992).

89. See GUIDELINES, *supra* note 8, at XXXIX-XXXI for WestLaw research guide. As a result of the Guidelines, the Federal Sentencing Reporter, edited by Professors Freed and Miller, resulted.

90. Tonry, *supra* note 12.

91. Freed, *supra* note 11, at 1696. As noted by Judge Avern Cohn, the Sentencing Reform Act provides for Congress to review and take action on the four-year Commission and GAO reports on the state of the Guidelines. *The General Accounting Office*

Report to Congressional Committees on Sentencing Guidelines -- A Reaction, 5 FED. SENT. R. 156 (1992).

92. See generally COMMISSION REPORT, *supra* note 1. See also Note, *The FEDERAL SENTENCING GUIDELINES: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* (December 1991), 5 FED. SENT. R. 126 (1992) (summation of the Commission's Executive Summary). The Commission began its report by qualifying its data and explaining the study's shortcomings. Instead of four years of data, the study only encompassed two years of Guidelines cases due to the constitutional challenges. At the request of the Department of Justice and the Commission, Congress created a bright line rule that all offenses committed after November 1, 1987, would be subject to the Guidelines. This rule allowed for the transition from a parole to a non-parole system and also drastically effected the number of cases available for review and analysis in the four year report. Additional factors such as transition, newness, and brevity, probably impacted on the results of the study. The significance of these additional factors will undoubtedly ameliorate over time.

93. COMMISSION REPORT, *supra* note 2, at 5.

94. *Id.* at 5, 9-14, see generally vol. I, ch. 3.

95. *Id.* at 31-54, see generally vol. II, ch. 4. The following findings resulted:

1) Bank robbers "receive dramatically more similar sentences" under the Guidelines.

2) Guideline application not only reduced the sentencing range and time served for bank embezzlement, but the median sentence shifted away from probation and toward imprisonment. This reflects the Commission's intent of increasing the severity of punishment for white collar crimes.

3) For the drug offenses, heroin and cocaine, mandatory minimums skewed the results. Mandatory minimums tied to drug amounts resulted from the Anti-Drug Abuse Act of 1986. In the drug categories where sufficient samples existed for analysis, the Guidelines reduced disparity for heroin and cocaine (powder based) distribution. The heroin and cocaine studies also indicate that removing departure cases reduced disparity even further, but that "substantial variations appear in the top and bottom ten percent of [cocaine distribution] sentences."

96. *Id.* at 56-60, 373-378, *See generally* vol. II, ch. 5.

97. *Id.* at 60-63, 378-381, *See generally* vol. II, ch. 5.

98. *Id.* at 60. Prison length for drug offenses increased 248%. Prison length for robbery offenses increased from a mean sentence of 60 months to 78 months. This increase primarily resulted from mandatory minimum firearm charges. After removing those cases from the group, robbery sentences only varied from 60 to 66 months. Average prison terms for economic crimes remained

stable when factoring in probation, but decreased slightly after removing probation.

99. 28 U.S.C. § 994(g). The Commission identifies other attributable causes of prison overcrowding such as mandatory minimums. As noted by Karle and Sager, the issue is the overcrowding of prisons, not who or what caused the overcrowding. *Supra* note 11, at 418.

100. Parent, *supra* note 51, at 1784-85.

101. Nagel, *supra* note 3, at 924-25. In its 1992 amendments to the Guidelines, the Commission extended the option of no prison in levels 7 and 8, criminal history category I, in response to requests for additional nonincarcerative opportunities.

102. COMMISSION REPORT, *supra* note 2, at 78, *see generally* vol. II, ch. 6.

103. *Id.* at 85.

104. Sentencing Reform Act, *supra* note 5, at 236.

105. GAO REPORT, *supra* note 10, at 9-10.

106. *Id.* at 12-13, *see generally* App. I and II. GAO found supposedly neutral characteristics such as gender and race effected in the resultant sentence. The Commission reached the same results, but because those sentences were within the sentencing range, the Commission did not classify the differences as unwarranted disparity.

107. *Id.* at 14-16.

108. *Id.* at 20-23, *see generally* App. V. One problem anticipated by the Commission, reduction of plea agreements and subsequent docket jams, has not materialized. Statistics from 1990 show that the U.S. Attorneys handled more than 70% of all cases by plea agreement. However, the Probation and Defender Service Divisions of the Administrative Office requested staff increases because Guidelines cases required more pre-trial time per case than pre-guideline cases.

109. *Id.* at 22.

110. *Id.* at 23.

111. *Id.* at 16-20, *see generally* App. IV (Responses from survey categorized by topic and summarized).

112. ABA Survey, *supra* note 11, Executive Summary, at 1-2. The ABA study resulted from surveys of circuit and district judges, U.S. Attorneys, and Chief Federal Defenders and members of the National Association of Criminal Defense Lawyers. Of those sent surveys, only prosecutors had a response rate greater than 50%. Professor Tonry believes those responding would generally be Guideline supporters. The ABA did not publish the names or circuit areas of those responding. Generally, those who respond to surveys have a statement to make about the subject being surveyed. In the area of Guidelines, the vocal majority, based on publication and hearings, are critics. I see no reason why this logic should not apply to those responding to this

survey. Only the prosecutors had no option; they were told they would participate.

113. *Id.* at 6-7. The most litigated issues are scope of conduct, departures, personal characteristics, criminal history, and government assistance.

114. *Id.* at 3. However, survey results can be misleading because surveys, like Guidelines, cannot account for all possible permutations and combinations. For example, of the District Judges responding, 54% said the Guidelines were not working, but 46% said they were working. When asked why Guidelines were achieving uniformity, the district judges said consistent sentences and control of the judge's discretion. District judges responded Guidelines were not achieving uniformity because no flexibility, the prosecutor supplants the judge's discretion, and "other." Advantages cited by district judges were uniformity and predictability relieves the judge of sentencing responsibilities, and 13 "other". Lack of flexibility, prosecutorial control, harsh and unjust sentences were the most commonly stated disadvantages. Of the changes required, district judges responded make them un-mandatory, get rid of them, get rid of mandatory minimums, and 28 "other". *Id.* at Survey of Federal District Judges, at 1-7.

Approximately 65% of circuit judges said Guidelines are achieving uniformity, because of consistent sentences. They also responded that the Guidelines were not achieving uniformity

because of prosecutorial control and "other". Advantages were uniformity and truth in sentencing, with 9 "other". Disadvantages were prosecutorial control, more time consuming, sentences too tough, and 10 "other". When asked to provide helpful changes, 14 responded get rid of them, 13 said give district judges more discretion, and 40 "other". *Id.* at Survey of Circuit Judges, at 1-3.

Defense attorneys almost unanimously responded, 90%, that the Guidelines were not resulting in uniformity and cited the prosecutor's control of the case as the primary reason. Fifteen defense attorneys responded that uniformity was an advantage and 26 responded that prosecutorial control and lack of discretion were disadvantages. When asked to propose changes, 11 defense attorneys responded get rid of them, 6 responded make them un-mandatory, and 12 responded "other". *Id.* at Survey of Criminal Defense Attorneys, at 1-7.

Of the United States Attorneys, 95% said Guidelines result in uniformity and that uniformity was the major advantage. Guideline disadvantages cited were time consuming, inflexible, additional litigation, and 23 "other" responses. Recommended changes from prosecutors included increased availability of substantial assistance, harsher sentence range for white collar fraud, and 17 "other". *Id.* at Survey of U.S. Attorneys, at 1-7.

115. *Id.* at Executive Summary, at 2-3.

116. *Id.*

117. *Id.* at Survey of U.S. Attorneys, at 3.

118. See Miller and Freed, *Editors' Observations*, 5 FED. SENT. R. 2, 3-4 (1992) (Some districts for one reason or another comply with the Guidelines more than other districts.)

119. Subcomm. Hearings on S. 2521 *infra* note 219, at 24.

120. Act of 1950, Pub. L. No. 506, ch. 169, 64 Stat. 107 [hereinafter MJA of 1950]. Enacted "to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice." See generally Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87 (1986). The author provides an excellent historical and biographical account of the evolution of sentencing in the military justice system from the early 1900s to 1986.

121. Exec. Order No. 10,214. [hereinafter MCM of 1951]

122. *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 64 (1949) [hereinafter *Senate Report on S. 857 and H.R. 4080*] (statement of Arthur E. Farmer and Richard H. Wells reprinted in N.Y. UNIV. L. R. (April 1949)). The clemency board reviewed 27,500 GCMs in which the accused remained in confinement.

123. *Supra* note 120.

124. Uniform Code of Military Justice, Article 66. [hereinafter UCMJ, Art. ____] Prior to enactment of the UCMJ, only the Army in Articles of War 50 (a), (d), (e), and (g), 51, and 52 had such a review board in operation. Article 39 (e) and (f) of the proposed changes to the Articles for Government of the Navy intended to incorporate the Army's concept. The only problem which surfaced at the hearings was the Coast Guard's concern that they be allowed to use senior civilians, since the Coast Guard had minimal senior judge advocates. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House of Representatives Comm. on Armed Services, 81st Cong., 1st Sess. 1187 (1949) [hereinafter House Report on H.R. 2498].*

125. UCMJ, Art. 67. Prior to enactment of the UCMJ, the concept of a final appellate tribunal existed, but no service had one in place. This article was one of the most controversial; critics opposed the introduction of civilians into the military disciplinary structure. Originally referred to as Judicial Council, the name was changed to "The Court of Military Appeals" after the Committee decided that Council suggested "one of the usual basement operations here in Washington." *House Report on H.R. 2498, supra note 129, at 1269, 1276-78.*

126. Grove, *supra* note 19, at 27.

127. *Senate Report on S. 857 and H.R. 4080, supra note 122, at 64.* On March 25, 1946, the Vanderbilt Committee began work on combining the service's disciplinary rules.

128. Prior to the UCMJ, the Army had summary, special, and general courts-martial. In the same order of severity, the Navy had deck, summary, and general courts-martial. UCMJ, Arts. 16-20 (Article 16: types of courts-martial, Article 17: court-martial jurisdiction, Article 18: GCM jurisdiction, Article 19: SPCM Jurisdiction, and Article 20: SCM jurisdiction); *House Report on H.R. 2498*, *supra* note 124, at 956, 964.

129. UCMJ, Art. 46. Originating from Article of War 22, the Committee specifically added the "equal opportunity" language in place of "at the request of defense counsel." The Committee wanted defense to have all of the rights government possessed. *House Report on H.R. 2498*, *supra* note 124, at 1057.

130. UCMJ, Arts. 55-58.

131. S. REP. NO. 486, *supra* note 16, at 25.

132. UCMJ, Arts. 59, 64.

133. UCMJ, Art. 60.

134. UCMJ, Art. 66.

135. *Id.*; S. REP. NO. 486, *supra* note 16, at 28.

136. UCMJ, Art. 67.

137. *Id.*

138. UCMJ, Arts. 77-134; S. REP. NO. 486, *supra* note 16, at 32.

139. See generally *Senate Report on S. 857 and H.R. 4080*, *supra* note 122, at 75-84. The ABA position since WWI has focused

on divesting the CA of his omnipotence in the disciplinary process. Recommendations of the ABA regarding the UCMJ reflect its concern toward elimination of unlawful command influence.

140. *Id.* at 84.

141. Beginning with the Act of September 27, 1890, 26 Stat. 491, ch. 998, Congress authorized the President to prescribe punishment limits. The first statutory authorization for the President to promulgate rules for court-martial procedure was Article of War 38 amended by the Act of June 4, 1920, ch. 227, 41 Stat. 787 (1920). This authorization, only applicable to Army courts-martial, was extended by the MJA of 1950 in UCMJ, article 36(a) for all courts-martial.

Congress routinely authorizes the President, as Commander-in-Chief, to regulate the implementation of their laws. Article 36 of the UCMJ provides that the President execute implementing regulations to carry out the laws of Congress and to conform military justice rules and practices to those used by the federal district courts as much as possible. UCMJ, Art. 36. As early as 1858, the Supreme Court in *Dynes v. Hoover*, 20 U.S. (79 How.) recognized that Congress possessed the power to provide for the trial and punishment of the military in courts seated in Article I, not Article III of the Constitution. The Court over 130 years ago said military courts operate as instrumentalities of the President, as provided by Congress, to assist him in the command and discipline of the military. *Id.* This ruling paved

the way for the President to promulgate the present day Manual for Courts-Martial.

142. MCM of 1951, para. 75 (Presentencing Procedures).

143. MCM of 1951, para. 76 (Sentence).

144. *Id.*

145. MCM of 1951, para. 48 (allowing for defense counsel to submit matters for the CA's post-trial consideration), para. 77 (conclusion of trial which includes accused's right to submit clemency matters), para. 84 (authorizing the CA to act on the sentence).

146. *See generally* MCM of 1951, ch. XX. Sentences extending to death, a general (or flag) officer, dismissal, unsuspended punitive discharge, or confinement for one year or more required review by BOR.

147. 8 C.M.A. 402, 24 C.M.R. 212 (1957).

148. *Id.* at 404-405, 214-215.

149. 10 C.M.A. 102, 27 C.M.R. 176 (1959); *see also United States v. Ballard* 20 M.J. 282 (1985) (following *Mamaluy*).

150. *Mamaluy*, 10 C.M.A., 27 C.M.R. at 106, 180.

151. *Senate Report on S. 857 and H.R. 4080*, *supra* note 122, at 140. Colonel Wiener wrote that the military commander requires immediate obedience, and sometimes fear, to deter criminal conduct. He believed civilian judges would not understand this elementary concept of military command.

152. 20 C.M.R. 917, 919 (A.F.B.R. 1955). The MCM of 1984 at R.C.M. 1001(b)(5) allows evidence of rehabilitative potential. Beginning with *United States v. Ohrt*, 26 M.J. 327 (C.M.A. 1988), the Court of Military Appeals effectively closed the door on government introducing evidence of rehabilitative potential.

153. 17 C.M.A. 391, 38 C.M.R. 189 (1967).

154. 17 C.M.A. 319, 38 C.M.R. 117 (1967).

155. *Id.* at 320, 190 (dissenting opinion).

156. 17 C.M.A. 198, 37 C.M.R. 462 (1967).

157. *Id.* at 199, 463.

158. *United States v. Carter*, 1 C.M.A. 108, 2 C.M.R. 14 (1952).

159. 4 C.M.A. 650, 16 C.M.R. 224 (1954).

160. *Id.* at 652, 226.

161. *United States v. Capito*, 31 C.M.R. 369, 370 (A.B.R. 1962).

174. *United States v. Robbins*, 16 C.M.A. 474, 478, 37 C.M.R. 94, 95 (1966).

163. 8 C.M.A. 504, 508, 25 C.M.R. 8, 12 (1957).

164. 8 C.M.A. 552, 553, 25 C.M.R. 56, 57 (1957).

165. *United States v. Blau*, 5 C.M.A. 232, 243, 17 C.M.R. 232, 243 (1954) (ruling documents were appropriate rebuttal evidence).

166. 8 C.M.A. 603, 605, 25 C.M.R. 107, 109 (1958).
167. *United States v. Weller*, 18 C.M.R. 473, 481-482 (A.F.B.R. 1954).
168. 7 C.M.A. 242, 22 C.M.R. 32 (1956).
169. *Id.*
170. BLACK'S LAW DICTIONARY 98 (5th ed. 1987).
171. UCMJ, Art. 61.
172. *See, e.g., United States v. McNeil*, 14 C.M.R. 710 (A.F.B.R. 1954); Vowell, *supra* note 120, at 132. *See infra* notes 194, 203, 324.
173. *United States v. Lanford*, 6 C.M.A. 371, 20 C.M.R. 87 (1955). Interestingly, the Court of Military Appeals held that the CA could not consider post-trial misconduct, but could consider detrimental matters after giving the accused an opportunity to respond. *United States v. Vara*, 8 C.M.A. 651, 25 C.M.R. 155 (1958).
174. Vowell, *supra* note 120, at 135.
175. 9 C.M.A. 148, 25 C.M.R. 410 (1958).
176. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).
177. *To Amend Chapter 47 (Uniform Code of Military Justice) to Title 10, United States Code: Hearings on H.R. 12705 Before Subcomm. No. 1 of the House of Representatives Comm. on Armed Services, 90th Cong., 1st Sess. 8319 (1967) reprinted in INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, 1968, at 225,*

235. [hereinafter *Subcomm. Report on H.R. 12705*] (Testimony of MajGen Kenneth J. Hodson, U.S. Army).

178. FED. R. CRIM. P. 23(a).

179. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968) [hereinafter MJA of 1968] *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, 1968, at 1. H.R. 1481 originally was introduced as H.R. 12705 by the Honorable Charles Bennett. In responding to the report of the subcommittee, he observed that the only issue remaining after the subcommittee hearings seemed to be the procedural mechanism for considering an accused's request for trial by judge alone. He recommended that the bill as passed follow district court procedures where the court and the government must agree before the request may be approved. Bennett compared the military judge to the district court judge and the CA to the U.S. attorney who drafted the charges. *Subcomm. Report on H.R. 12705, supra* note 177, at 276.

180. H. REP. NO. 1481, 90th Cong., 2d Sess. 2 (1968) [hereinafter H.R. 1481] *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, 1968, at 10, 11; UCMJ, Art. 51. Mr. Philbin in his report to the House Committee on Armed Services said this restriction resulted from the Supreme Court's decision in *United States v. Jackson*.

181. UCMJ, Art. 51.

182. Original House version of H. REP. NO. 1481, *supra* note 180.

183. *Subcomm. Report on H.R. 12705, supra* note 177, at 8329, 245. (Letter of Judge Homer Ferguson, U.S. Court of Military Appeals). SPCM without a military judge remained, but could not adjudge a BCD unless physical conditions or military exigencies prevented judge's assignment.

184. H.R. 1481, *supra* note 180, at 7, 16.

185. 7 C.M.A. 208, 211, 21 C.M.R. 334, 337 (1956) Judge Ferguson writing for the court said the services should set up by amendment or regulation such pretrial proceedings if determined desirable. Note also that the court was swayed by the fact that defense not only declined to object, but said he supported the procedure to reduce the possibility of members considering unfavorable, inadmissable evidence.

186. H.R. 1481, *supra* note 180 at 4, 13. (Statement of Stanley R. Resor, Secretary of the Army).

187. General Hodson in testifying in support of Mr. Bennett's bill stated the military wanted to make SPCM and GCM procedures conform more closely with federal procedures. In support of H.R. 15971, the sister bill to H.R. 12705, Secretary Resor wrote that a military judge performing a job similar to a district court judge would allow for more efficient and effective use of the members and the courts time.

MJA of 1968, Article 19, also provided that legal counsel must be provided the accused if a BCD was possible even in time of war. With amendment of Article 66, the boards of review became the Courts of Military Review. Article 69 was amended to allow for review where record not subject to review by the Court of Military Review.

188. Executive Order No. 11,476 (1969).

189. MCM of 1969, para. 75(b)(2).

190. *Id.* at para. 75(d).

191. *Id.* at para. 76(a)(2) and 85(b). Members may consider uncharged misconduct even when not permissible evidence. CA may consider adverse matters outside of the record if pertinent to his sentencing decision after providing notice of such matters to the accused.

192. *United States v. Worley*, 19 C.M.A. 444, 445, 42 C.M.R. 46, 47 (1970) (holding that President has authority to promulgate changes to MCM as long as constitutional).

193. 3 M.J. 443, (1977) *republished in* 5 M.J. 238, 243 (1977).

194. 19 C.M.A. 464, 42 C.M.R. 66 (1970) (holding that counsel at Article 15 proceedings not required for Article 15 results to be considered during sentencing, but cannot be used to "escalate" punishment under para. 127c, MCM of 1969). "The information available to the sentencing agent in military

practice is still more favorable to an accused than is the procedure followed in the United States district courts, where the presentencing report furnished the judge may include an extensive variety of information....[A]lthough the use of records of Article 15 punishment seems completely consistent with the practice in United States district courts....

195. *Booker*, 3 M.J. at 243-44. The court also stated in footnote 23 that a SCM conviction cannot be used to impeach testimony. The Supreme Court in *Middendorf v. Henry*, 425 U.S. 25 (1976) ruled that SCM proceedings were not criminal because of the absence of due process and the minimal punishment an accused faced. Because SCM were not criminal, then according to the Supreme Court the right to advice of counsel did not arise.

196. 6 M.J. 357, 358 (C.M.A. 1979).

197. 425 U.S. at 25.

198. *Vowell*, *supra* note 120, at 149.

199. *United States v. Mosely*, 1 M.J. 350 (C.M.A. 1976) (holding that judge may not send a message to other pushers, but must individualize the sentence).

200. *United States v. Lacey*, 23 C.M.A. 334, 49 C.M.R. 738 (1975) (holding that CA's failure to consider judge's recommendation for clemency and inflexible attitude toward thieves denied accused of individualized sentencing considerations).

201. *United States v. Lucas*, 2 M.J. 834 (A.C.M.R. 1976).

202. *United States v. Varacalle*, 4 M.J. 181, 183 (C.M.A. 1978) *criticizing Mosely*, 1 M.J. at 350, writing for the court, Chief Judge Fletcher criticized *Mosely*, in which he concurred, and distinguished *Mamulay* because *Varacalle* does not forebear deterrence, only estops deterrence as sole consideration for sentence. Chief Judge Fletcher especially concurred with Justice Black's dicta in *Williams v. New York*, 337 U.S. 241, 248 n. 13 (1949) that punishment must fit the criminal as well as the crime. See also *United States v. Lania*, 9 M.J. 100 (C.M.A. 1980).

203. *United States v. Hill*, 4 M.J. 33, 38 (1977) (holding that counsel or waiver required.) The court also traces its history of support of the post-trial interview from 1954 to provide full information to the CA for a proper sentencing decision. Article 31 warning not required, but must be told of right to be silent. Army Court of Military Review in *United States v. Simpson* noted that no reference to post-trial interview existed in any statutes or regulations.

204. *Id.* at 37 n.18. The court argues that members should not sentence and that presentence reports "prepared by an agency divorced from the trial proceedings...causes a truly bifurcated trial proceeding, but the importance and value both to the trial judge and litigants of having [the probation officer's] report makes this process laudable.... This concept...is in our view

far preferable to the system currently utilized by the military. Adoption of such a system would eliminate much of the need cited as the underlying basis for the current procedures, and would invariably produce a more informed decision....

205. *Estelle v. Smith*, 451 U.S. 454 (1981).

206. *United States v. Turner*, 21 C.M.A. 356, 45 C.M.R. 130 (1972).

207. *Id.* at 357, 131; see also Vowell, *supra* note 120, at 138.

208. *United States v. Edwards*, 23 C.M.A. 202, 48 C.M.R. 954 (1974).

209. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975).

210. The court extended its strict interpretation to the requirement that the government must show the finality of a conviction before it could be admitted even during sentencing. In *United States v. Cohen*, 23 C.M.A. 459, 43 C.M.R. 309 (1971) the court ruled records, even if accurate, were inadmissible if inaccurately filed. The MCM of 1969, paragraph 75(b)(2) required finality, but did not require the court's extension of form over substance to records. Federal law at that time, and today under the Guidelines, merely required a showing by a preponderance of the evidence that the accused committed the offense; actual conviction or even trial was not required. See GUIDELINES, *supra* note 8 (allowing acquittals and indictments to be used as punishment enhancers).

211. Vowell, *supra* note 120, at 152.

212. 9 M.J. 100 (C.M.A. 1980). Chief Judge Everett stated that "in evaluating trial counsel's argument, we start from the premise that general deterrence is a proper functioning of sentencing," at 102.

213. Warren, 13 M.J. 278, 281 n.6 (1982) (citing to *United States v. Grayson*, 438 U.S. 41 (1978) and Judge Kastl's concurring opinion which compares the military and the federal sentencing systems).

214. *United States v. Hammond*, 17 M.J. 218 (1984).

215. *United States v. Strong*, 17 M.J. 263 (1984). *But see United States v. Cofield*, 11 M.J. 422 (1981) (holding government cannot impeach the accused's testimony with a SCM conviction because SCM proceedings are not criminal); *United States v. Gambini*, 13 M.J. 423 (1982) (ruling that counsel cannot use uncharged misconduct, even if otherwise relevant, to impeach).

216. *United States v. Boles*, 11 M.J. 195 (1981) (holding a letter of reprimand inadmissible even though properly in personnel record, because drafted to enhance punishment, not to reprove).

217. *Id.* at 198, n.5.

218. Vowell, *supra* note 120, at 157; 15 M.J. 128 (1983).

219. Morgan, 15 M.J. at 130.

220. *Id.* at 134. *But see* Judge Cook's concurrence where he

argues the ruling presents an incomplete sentencing picture. *Id.* at 137. Military Rule of Evidence 106 provides that when documents are entered into evidence they should be complete so the court does not receive a one-sided view.

221. As under the MJA of 1950 and the MJA of 1968, the military through the armed services committees sought changes to the UCMJ to enhance military justice. Court-martial members remained under the ultimate control of the convening authority, even though groups like the ABA continued to pressure Congress to remove this power from the convening authority. To enhance the operation of the court-martial process, Congress agreed that the convening authority could delegate authority to excuse members.

Congress also removed some of the convening authority's burdensome post-trial responsibilities, by freeing the convening authority and SJA from legal review of the record of trial. Due to the increasingly complex nature of the review and the sophistication of the military appellate courts, Congress authorized the convening authority to perform solely as a clemency authority, making action of the findings optional. By requiring service of the record of trial and the SJA's recommendation of the defense counsel and letting the accused retain his right to submit clemency matters, expanded the accused's post-trial rights and Congress eliminated duplicative review. Mr. Taft, the civilian Government Counsel for DoD, said

the amendment removes a cumbersome, error prone, outmoded legal procedure.

Government for the first time could appeal an adverse decision by the military judge. Paralleling the federal rules, this amendment provided for interlocutory appeal by government of adverse rulings excluding evidence or causing dismissal of the charges. Congress did not want an accused to escape prosecution because of an erroneous ruling by the trial court.

Post-trial review changed to allow more latitude in appellate procedures. The accused could now waive or withdraw the right of automatic appeal; required the accused to file notice of waiver or withdrawal of appeal. General officers no longer received special treatment by enjoying automatic appeal based on grade. The most important amendment according to the Honorable G. V. (Sonny) Montgomery authorized direct access by the Court of Military Appeals to the Supreme Court and access by writ of certiorari, from the accused.

222. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983) *reprinted in* LEGISLATIVE HISTORY OF THE MILITARY JUSTICE ACT OF 1983.

223. H.R. REP. NO. 549, 98th Cong., 1st Sess. 14, 18 (1983).

224. *Id.*

225. *Id.* at 18 (in an enclosure to his letter to the Committee).

226. *Id.* at 14; S. REP. NO. 53, 98th Cong., 1st Sess. 4 (1983).

227. *To Amend Chapter 47 of Title 10, United States Code (the Uniform Code of Military Justice), to improve the Quality and Efficiency of the Military Justice System, to Revise the Laws Concerning Review of Courts-Martial, and for Other Purposes: Hearing on S. 974 Before the House of Representatives Comm. on Armed Services, 98th Cong., 1st Sess. 67 (1983) [hereinafter Comm. Report on S. 974]. See generally pages 67-72 for the creation of the Code Committee to sit for three years to consider the amendments raised in debate of the MJA of 1983 and make a report to the Armed Service Committees, the Secretary of Defense, the Service Secretaries, and the Secretary of Transportation. The Secretary of Defense was told to establish a commission to study the specified questions and report its results to all concerned parties; 1 Military Justice Act of 1983 Advisory Commission Report.*

228. *Comm. Report on S. 974, supra note 227, at 31; The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. on Armed Services, 97th Cong., 2d Sess. 22, 86 (1982). [hereinafter Subcomm. Report on S. 2521].*

229. *Comm. Report on S. 974, supra note 227, at 30-31; Subcomm. Report on S. 2521, supra note 228, at 22-23.*

230. *Subcomm. Report of S. 2521, supra* note 228, at 56.
(Prepared statement of Brigadier General William H. J. Tiernan,
U.S. Marine Corps, Director, Judge Advocate Division,
Headquarters, U.S. Marine Corps).

231. *Id.* at 58. Testimony of Major General Hugh J.
Clausen, USA, The Judge Advocate General of the Army, where he
stated:

I don't think its a question of confidence in the
judiciary....The question I believe is whether it is
appropriate at this time to take something away from
the soldier, the right to not only be judged by his
peers, but also to be sentenced by his peers which the
soldiers have had since the Revolutionary days when we
basically adopted the British Articles of War.

232. Executive Order No. 12,473. (1984) (Effective August
1, 1984).

233. MCM of 1984, ch. X, also R.C.M. 1001-1011, comprise
rules on presentencing procedure, types of punishment, capital
punishment procedures, and presentencing hearing procedures.

234. R.C.M. 1001(b)(5).

235. 8 M.J. 146 (C.M.A. 1979).

236. 28 M.J. 301 (C.M.A. 1989) (holding that the witness
must testify from personal knowledge of accused's character and
cannot imply opinion as to retention or discharge); *United
States v. Auruch*, 31 M.J. 95 (C.M.A. 1990) (holding CO cannot

testify that he does not want accused back in unit); *United States v. Goodman*, 33 M.J. 84 (C.M.A. 1991) (holding error for trial counsel to ask if witness wanted accused back in unit, but error harmless because answer self-evident from nature of conviction). The one area where the Court of Military Appeals appears to support R.C.M. 1001(b)(5) evidence is in opinion testimony from experts especially in sexual assault and sexual abuse cases. See, e.g., *United States v. Stinson*, 34 M.J. 233 (C.M.A. 1992).

237. MCM of 1984, Analysis to R.C.M. 1001(b)(5) at App. A21-64.

238. MCM of 1984, Analysis to R.C.M. 1001(b)(2) at App. A21-63. The Court of Military Appeals in a *per curiam* opinion said MRE 106 carried greater weight than the R.C.M.s. *United States v. Salgado-Agosto*, 20 M.J. 238 (C.M.A. 1985).

239. R.C.M. 1001(b)(3) (cannot consider juvenile convictions) SCM must complete review under Article 64 or 66 prior to admissibility.

240. R.C.M. 1001(b)(4).

241. 13 M.J. 403 (C.M.A. 1982).

242. *United States v. Martin* 20 M.J. 227 (C.M.A. 1985); but see *United States v. Wingart* 27 M.J. 128 (C.M.A. 1988) (holding that uncharged misconduct must relate to accused's offenses).

243. R.C.M. 1001(g).

244. R.C.M. 1002 provides the following limited guidance in sentencing:

Subject to the limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed [e.g., Violation of Article 106 for spying carries a mandatory death sentence] by the code, a court-martial may adjudge any punishment authorized in this Manual....

DA PAM 27-9, Military Judge's Benchbook, para, 2-54 (1 May 1982) (providing for instruction to members on sentencing philosophies which include protection of society, punishment, rehabilitation, preservation of good order and discipline, deterrence of the wrongdoer, and general deterrence); Grove, *supra* note 19, at 27.

245. R.C.M. 1106 (SJA Recommendation encompasses old SJA Review and CA Clemency Report); R.C.M. 1106(d)(4) and R.C.M. 1107(b) (specifying that neither the SJA nor CA must review the record for legal errors).

246. Commissioner Nagel writes that Judge Frankel made the following remarks at a Commission hearing on the proposed Guidelines:

I would have thought that you'd [the Commission] have started from the opposite end of the telescope, that you'd have started with a very simple document and a

very simple set of guidelines that judges, brand new to this and wholly unaccustomed to it, and their probation officers as well, would not view with a kind of fright that I think this preliminary set [of guidelines] will engender.

Remarks at the Hearings before the United States Sentencing Commission, New York, New York (Oct. 21, 1986) *reprinted in* Nagel, *supra* note 3, at 921 n.211.

247. Nagel, *supra* note 3, at 940.

248. GUIDELINES, *supra* note 8, at § 1B1.9.

249. *Id.* at § 8A1.1. Congress specifically excluded military criminal law from Guidelines application. 18 U.S.C. § 3551.

250. *Comm. Report on S. 974, supra* note 227, at 3 (Statement of the Honorable Elwood H. (Bud) Hillis, a Representative from Indiana). As has been repeatedly emphasized by military leaders, Congress, military courts, and federal courts, the purpose of sentencing in the military differs dramatically from the four sentencing purposes espoused under present federal law. The Supreme Court has repeatedly held that when citizens join the military service, they lose some of the rights and privileges afforded civilians. *Burns v. Wilson*, 346 U.S. 137 (1953); *United States v. Graf*, 35 M.J. 450 (1992). Because of the military's unique mission, restrictions and infringements are permissible so long as the Bill of Rights and

the Constitution are not violated. *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Parker v. Levy*, 417 U.S. 733 (1974); *United States v. Culp*, 14 C.M.A. 199, 33 C.M.R. 411 (1963). See contra *United States v. Matthews*, 16 M.J. 354 (1983) (Constitutional protection apply to military persons as pertaining to the death penalty).

The Supreme Court has increasingly accorded great deference to the military justice system. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). The Court considers Court of Military Appeals equal to other legislative courts, but also different; holding a special place in the executive branch. Court of Military Appeals's role in military law has been compared to the Supreme Court's role in federal law by the Supreme Court. See e.g.,

Subcomm. Report on S. 2521, supra note 219, at 271 (Statement of Colonel John J. Douglass [Retired], Professor of Law, Univ. of Houston, Judge Advocates Assoc.).

Increasingly, the courts and citizens have accorded greater respect for military trial and appellate judges equating them to district court and circuit court judges even though their authority rests solely in Article I. *Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process: Hearings on H.R. 6406 and H.R. 6298 Before the Military Personnel Subcomm. of the House of Representatives Comm. on Armed Services*, 96th Cong., 2d Sess. 50-53 (1980) [hereinafter *Subcomm. Report on H.R. 6406 and H.R. 6298*]. To enhance Court of Military

Appeals's power and extend the rights of servicemembers, Congress granted direct access to the Supreme Court.

Congress and military leaders involved in the legislative history of the present day UCMJ join the Supreme Court in favorably comparing the military justice system to the federal criminal court system. The military has adopted some federal rules, often modified to conform to unique features of military law, in an effort to enhance the military justice system. For example, after two years of intense committee work, the military, in 1980, adopted a modified version of the Federal Rules of Evidence. MCM of 1984, app. 22, A22-1. The rules were drafted by the Evidence Working Group of the Joint-Service Committee on Military Justice.

251. UCMJ, Art. 67; *see also Subcomm. Report on 2521, supra* note 228, at 38-40. (Statement of William H. Taft, General Counsel of the Dept. of Defense).

252. UCMJ, Art. 66.

253. *See United States v. Graf*, 35 M.J. 450 (1992) for a general discussion of the position military judges hold in the federal court system.

254. I refer to the military court as a super circuit court because military appellate judges only resolve criminal law matters, so in the area of criminal appellate sentencing law, military court experience and knowledge exceeds even circuit

court judges. Additionally, CMRs jurisdictional powers exceed the circuit courts' powers in many respects.

255. UCMJ, Art. 66 provides automatic appeal in cases where the approved sentence includes death, dismissal, discharge, or confinement for one year or more. As Appendix A shows, the majority of GCMs contain one of these qualifiers as part of the sentence.

256. *Mistretta v. United States*, 488 U.S. 361, 363-64 (1989). *United States v. Colon*, 884 F.2d 1550, 1552 (2d. Cir.) cert. denied, 110 S. Ct. 553 (1989).

257. Freed, *supra* note 11, at 1692, 1727; GAO REPORT, *supra* note 10, at 168 (noting that in 1991, circuit courts heard 6460 appeals with sentencing issues).

258. But see Parent, *supra* note 51, at 1792-93 (postulating that case law development is slow and incremental, therefore, only of limited value).

259. UCMJ, Art. 70.

260. See Appendix C for an indication of the amount of work the military appellate courts handle on an annual basis. Data indicates that GCMs and appellate workload are consistently decreasing. Because of the reduction in force this trend will probably continue until a remobilization of forces occurs.

261. *Supra* note 69.

262. Nagel, *supra* note 3, at 934.

263. See, e.g., Freed, *supra* note 11, 1721-27; Nagel, *supra* note 3, at 935-939 (identifying three levels of prosecutorial discretion: plea bargaining; charge bargaining; and fact bargaining); Miller and Freed, *supra* note 118, at 4-5.

264. GUIDELINES OF 1987, *supra* note 8, at 1.3, 1.4; Nagel, *supra* note 3, at 930 n.248 I cannot hope to replicate the work done by the Commission in its case analysis and do not intend to do so. My analysis is strictly comparative, not statistical. Because I did not review individual records of trial, the results of this study only illustrate trends. For example, under rape, I do not differentiate between date rape and rape by an unknown assailant who uses a weapon.

265. UCMJ, Art. 128. All assaults other than simple assault.

266. UCMJ, Art. 120. All rapes except carnal knowledge, but not Article 134 in sexual assaults.

267. UCMJ, Art. 112a. Normally simple possession would not result in a GCM unless it accompanies an aggravating factor like introduction or distribution.

268. UCMJ, Art. 122. Robbery usually accompanies other serious offenses like aggravated assault. As a result, I restricted my data to only those cases where robbery was the predominant charge, thus the small number of cases. Because of the restrictions I placed on my comparisons, the Air Force had only one robbery case.

269. *Supra* note 54.

270. *Id.*

271. *Id.*; see also Weinstein, *supra* note 23, at 7-8.

272. According to Appendices A-9 through A-12, the vast majority of GCM sentences include a discharge. The data collected indicate that the characterization of discharge correlates to the offense of conviction. Rape and drug offenses resulted in dishonorable discharges. Aggravated assault and robbery offenses were at least twice as likely to result in bad conduct discharges than dishonorable discharges. These results suggest that guidelines contain a sentencing scheme which requires a DD for certain offenses where confinement greater than "X" is adjudged. For other offenses elimination of the DD except for extraordinary cases may be appropriate.

Some military legal personnel, lawyer and nonlawyer, have suggested complete elimination of the punitive discharge. They suggest the use of administrative separations. Because of the antipathy among commanders concerning the type of discharge, elimination of the punitive discharge might be an answer to increasing court-martial efficiency. Final actions on sentences involving approved discharges normally require a longer post-trial processing time.

271. UCMJ, Art. 58a.

274. R.C.M. 1002. However, they may lose lineal numbers.

Warrant officers may be reverted back to their enlisted pay grade.

275. Except in SCM, no prohibition exists to reducing senior enlisted to E-1. Normally total reduction occurs only in truly egregious cases because reduction effects pay and most senior enlisted have families to support.

276. The only normal exception to total forfeitures occurs when the accused's family or dependents need money to live on while the accused is in confinement.

277. Most CAs when determining the forum consider the amount of confinement possible. Rarely does an accused ever receive the maximum amount of confinement authorized by the MCM. Plea bargaining (pretrial agreement) discussion invariably revolves around the amount of confinement to be approved and ordered executed. Appendices B-1 through B-4 illustrate the certainty of some amount of confinement in most GCM sentences. The data indicates that CAs in about 30% of the studied cases entered into agreements affecting the length of confinement.

278. Once an average is determined, it should be adjusted to reflect the sentencing purpose.

279. Nagel, *supra* note 3, at 931-32.

280. Schulhofer, *supra* note 12; Weinstein, *supra* note 23, at 8; Freed, *supra* note 11, at 1750-51.

281. GUIDELINES, *supra* note 8 at 12; Nagel, *supra* note 3, at 934-35.

282. The Commission and its supporters contend that the adjustments and enhancements provided with the offense and other bases for departure provide the appropriate balance where more proportionality is required.

283. Weinstein, *supra* note 23, at 9 (Arguing for correction of Guideline problems through departures; Nagel, *supra* note 3, at 939 n.290.

284. Pre-charging decisions involve charging, plea negotiations, and evidentiary matters. The study conducted by Lawrence and Hofer, *supra* note 83, illustrates that interpretation and application of the Guidelines to a given fact situation can also result in hidden disparity. See The Thornburgh Memorandum *reprinted in* 5 FED. SENT. R. 421 (1989) (detailing DOJ policy for plea bargaining under the Sentencing Reform Act).

285. Judge Weinstein favors this approach for getting the Guidelines back on track. Most scholars recognize the danger of judicial departures which are applied too liberally and advocate a reasoned balance.

286. COMMISSION REPORT, *supra* note 2, at 81.

287. *Supra* note 284.

288. Miller and Freed, *supra* note 118, at 3-4.

"Prosecutors have taken over from the judges the major role in orchestrating departures from the guidelines." See, e.g., ABA Survey, *supra* note 11, at Summary, at 9.

289. Because of concern for the prosecutor's career, his name and district will not be published.

290. *Supra* notes 280 and 284. See also Department of Justice Policies, 4 FED. SENT. R. 349 (1991). Acting Deputy General George J. Terwilliger issued a "bluesheet" reinforcing the Thornburgh I and Thornburgh II memoranda on plea bargaining policy and practice by U.S. attorneys. In this correspondence stringent restrictions attempted to control disparity from pre-charging decisions.

291. UCMJ, Art. 25; R.C.M. 401.

292. UCMJ, Art. 34; R.C.M. 406 text and discussion.

293. All servicemembers receive regular evaluations for work performance. Because assignment of judge advocates, normally is not politically motivated as are U.S. attorney assignments, judge advocates face less pressure than federal prosecutors. Of course some military law offices generate more pressure than others due to location, type of cases, and personnel.

294. R.C.M. 306 (Initial Disposition); R.C.M. 704 (Immunity); R.C.M. 705 (Pretrial Agreements).

295. R.C.M. 303 provides for a preliminary inquiry into the

charges and the attendant circumstances. "The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation."

296. UCMJ, Art. 60; R.C.M. 1107.

297. Substantial federal appellate sentencing law involves the appropriate use of policy statements. In military context, the policy statements are comparable to the discussion section in the R.C.M.s. The Supreme Court in *United States v. Williams*, 112 S. Ct. 1112 (1992) said policy statements may acquire an authoritative nature due to their description of guideline or statute applicability. This comports with the weight placed on the "discussion" by military judges. Federal Sentencing Guidelines, BNA Criminal Practice Manual, No. 64, 141:201 (1993) (providing a compendium of case law with analysis) states policy statements are nonbinding, but then discusses the position of the circuits on application. Scholars criticize policy statements because the Commission may issue policy statements without congressional review. See 28 U.S.C. 994(a)(2) for congressional authority to issue policy statements.

298. 909 F.2d 479 (2d Cir. 1990) (young, vulnerable homosexual subject to victimization in prison so downward departure upheld). Amendment 386 of the Guidelines made "physique" not ordinarily relevant.

299. 898 F.2d 1326 (8th Cir. 1990) (departing downward due to good works in the reservation community). Amendment 386 of the Guidelines made good works and community activities not ordinarily relevant.

300. R.C.M. 1107; R.C.M. 1203; R.C.M. 1204.

301. 18 U.S.C. § 3742. When correcting an unreasonable or illegal downward departure, the case must be remanded "for further sentencing proceedings with such instructions as the court considers appropriate." The appellate courts cannot increase a sentence or order one increased, but the law permits a trial court to increase a sentence originally adjudged. Practically, few trial judges are going to change a sentence already pronounced; instead they will justify the departure on "legal" or "reasonable" grounds.

302. Parent, *supra* note 51, 1778-79; *see generally* Freed, *supra* note 11, 1708-09; VON HIRSCH, *supra* note 61.

303. SUPPLEMENTARY REPORT, *supra* note 38, at 15-16; Nagel, *supra* note 3, at 916 n.197.

304. *See, e.g., United States v. Lania*, 9 M.J. 100, 103 (C.M.A. 1980).

305. GUIDELINES, *supra* note 8, at 3.

306. *See generally* Frankel, *supra* note 41.

307. *Supra* note 244.

308. *Supra* note 63.

309. *Supra* note 46.

310. *Subcomm. Hearings on S. 857 and H.R. 4080, supra* note 122, at 140 (statement of Col. Weiner).

311. *Id.* at 76-85 (Testimony of Mr. George A. Spiegelberg, Chairman of the Special Comm. on Military Justice of the ABA). In GCM and SPCM, the CA charges the accused, decides which forum will try the case, if a GCM appoints a pretrial investigator (usually from his command), selects the members (again usually from his command), decides (subject to judicial review) what witnesses will be present at court to testify, reviews the record and acts on the sentence after the sentence is adjudged. Even with all of the potential unlawful command influence a CA could exert, Congress refused to remove his ultimate control over the proceedings. R.C.M. 403 (SCM); R.C.M. 404 (SPCM); R.C.M. 407 (charges). R.C.M. 401 (forum). R.C.M. 405 (Pretrial Investigation). R.C.M. 503 (The accused maintains control of the use of enlisted members except due to physical conditions or military exigencies. Enlisted members are gathered from a "unit" other than the accused's own unit. *Subcomm. Hearings on S. 857 and H.R. 4080, supra* note 122, at 8, identifies unit as "any regularly organized body as defined by the Secretary of the Department, but in no case shall it be a body larger than a company, squadron, or a ship's crew...." R.C.M. 703 (Production of Witnesses and Evidence). R.C.M. 1107 (CA's Action).

312. *Cf. supra* notes 120, 179, and 222. Where with

numerous opportunities to remove the commander from the military justice process, Congress chose not to take away his control over the discipline and punishment of his servicemembers.

313. *Subcomm. Hearings on S. 2521, supra* note 227, at 24.

314. *Id.* at 25.

315. Under Article 134, the General Article, an accused may not be convicted for its violation absent proof of conduct "*to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.*"

316. Grove, *supra* note 19, at 29; *Subcomm. Hearings on S. 857 and H.R. 4080, supra* note 122, at 140 (statement of Col. Weiner). Unjust discipline can erode morale and loyalty just as readily as no discipline at all. Because the military's mission is war-fighting and war-fighting requires absolute obedience, the purpose of military justice must be to instill the discipline, through just punishment, required to generate obedience.

317. UCMJ, Art. 39; See generally Benchbook, *supra* note 244 (providing for the use of Article 39a sessions). To promote efficiency, the military judge will often use this time to take care of administrative matters such as breaks, refreshments, sentencing worksheets; anything to help speed up the process should a guilty verdict be returned.

318. Grove, *supra* note 19, at 33.

319. GAO REPORT, *supra* note 10, at 170.

320. *Infra* App. C.

321. Current policy dictates that servicemembers with questionable character due to previous administrative or disciplinary proceedings will normally not be re-enlisted (augmented if an officer) or administratively processed. In theory this leaves the "good" servicemembers in the military.

322. GAO REPORT, *supra* note 10, at 162. *But see* Tonry, *supra* note 11 (asserting that workload increases under the Guidelines would be greater for average prosecutors and defense attorneys).

323. UCMJ, Art. 20; MCM of 1984, ch. XIII.

324. In numerous conversations with CAs as both a trial and defense counsel presenting a plea offer, CAs, except in serious cases, invariably were uninterested in the accused receiving a particular type of discharge; they just wanted the accused discharged.

325. *Supra* notes 203 and 204. Under the Guidelines, a presentence report is prepared by the probation officer and may not be waived by the accused. 18 U.S.C. § 3552; § 6A1.1 (policy statement). See FED. R. CRIM. P. 32(c) for a detailed explanation of presentence reports. See also Weinstein, *supra* note 23, at 8 (discussing the information contained in old presentence reports and the impact Guidelines have on determining basis for departures).

The Commission at Section 6A1.2 (policy statement) urges pre-sentencing reconciliation of disputes. In a related policy statement, the Commission urges reconciliation of disputes pertaining to the report prior to the hearing.

In *Burns v. United States*, 111 S.Ct. 2182 (1991), the Court held that when the trial court is considering a departure not specified in the presentence report or other presentence documents, specific notice must be provided. The Federal Rule of Criminal Procedure requires that the court provide the accused a ten day response time before imposing sentence. FED. R. CRIM. P. 32(C)(3).

In preparing the presentence report, the probation officer may look at any information, but must include:

information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant. FED. R. CRIM. P. 32(C)(2).

The judge may request the probation officer provide additional information. Judge Weinstein, laments the lack of personal information probation officers include in Guideline based reports. He and other critics recognize that most if not all of the information in the report comes from the prosecutor. Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1886 (1992).

The accused has the opportunity to provide information, but defense attorneys argue that the Guidelines provide little incentive for the accused to do so. Most of the information solicited for the report goes to punishment enhancement, even though the Guidelines provide for a substantial assistance departure and other departures at the judge's discretion. BNA Criminal Practice Manual, *supra* note 88, at 236. Under federal law, the accused does not have a right to have an attorney present during a presentence investigation interview, but the accused does have the right to talk to an attorney before the interview. See e.g., *United States v. Jackson*, 886 F.2d 838 (7th Cir. 1989) (holding that accused has no Sixth Amendment right to counsel during presentence interview); *United States v. Herrera-Figueroa*, 918 F.2d 1430 (9th Cir. 1990) (ruling that based on court's orderly administration of justice, accused has right to counsel during interview).

Although federal law requires that government and defense counsel attempt to reconcile any objections to the presentence report prior to presentencing hearing, the results of the ABA survey indicate this rarely happens. The survey, however, also indicates that the counsel largely ignore this requirement. ABA Survey, *supra* note 11, Survey of District Judges, at 3. (81% responded that 50% or less of their guideline sentences required hearings. Of defense counsels, only 25% said they go over guideline worksheets with probation officer prior to pleas. 76% said they never agreed with prosecutors on the sentencing

worksheet. U.S. Attorney responses contained similar percentages.)

326. *Cf.* R.C.M. 1002 (not listing probation as a punishment option).

327. *Supra* note 324.

328. Grove, *supra* note 19, at 31 nn.71, 72.

329. Telephone interview with Mr. David Orser, Deputy Chief, Clemency, Corrections and Officer Review Division, U.S. Air Force (Mar. 12, 1993). Mr. Orser saw no reason why corrections personnel could not be used as probations officers to prepare presentencing reports.

330. *Id.* Military parole operates under section 952, title 10, U.S. Code, as implemented by DoD Directive 1325.4 and service regulations. Because of its autonomy from the federal system, the military parole system is not directly affected by the shutdown of the U.S. Parole Commission.

Since rehabilitation is a nonviable sentencing purpose, military parole should be abolished. Data was not available to trace recidivism rates among military confinees released from the military, but those rates will probably parallel the civilian system. Abolishing parole will enhance discipline by creating truth-in-sentencing and making trained corrections personnel available to serve as probation officers.

Based on this interview, the letter from Mr. Houston, and the data used to derive Appendix B, only 0.1% of all long term

confinees are returned to active duty. That figure illustrates the low emphasis the military puts on rehabilitation. Another indication is the lack of probation as a sentencing option.

331. With the mandated reduction in end strength for all the services, legal offices are already reorganizing to meet mission requirements. With such a litigious based society, military law offices must remain full service. For this reason alone, the fourth option for a probation officer should be a last resort.

332. ABA Survey, *supra* note 11, at Summary, at 8.

333. *Id.* at 10.

334. GUIDELINES, *supra* note 8 contains 473 amendments. 57 Fed. Reg. 62, 832 (U.S. Sentencing Comm's December 31, 1992) contains 74 pages of proposed amendments published for public comment. Chairman William H. Wilkins, *Sentencing Guidelines for United States Courts: Notice of Priority Areas for Commission Study*, 5 FED. SENT. R. 119 (September/December 1992) details nine broad areas for potential amendment. *But see* Jeff Staniels, Opportunities for Courts and Advocates Under the 1992 Amendments, 4 FED. SENT. R. 314 (1992) (arguing that the Commission's amendment process ignores suggested changes).

335. *Cf. United States v. Toledo*, 26 M.J. 104 (C.M.A. 1988) and *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989).
(Creating some precedent in this area by providing for experts

and other personnel to be cloaked under the attorney-client privilege.)

336. Military Rule 1.6.

337. FED. R. CRIM. P. 32 (C).

338. *Supra* note 325.

339. Grove, *supra* note 19 at 33.

340. But see the comments by LtCol Grove where he asserts pretrial preparation in not guilty plea cases would be uneconomical. LtCol Grove, however, only considered the disciplinary aspects of presentence reports, not their potential use in administrative proceedings.

341. Telephone interview *supra* note 21.

342. Such a practice is currently employed in federal courts.

343. R.C.M. 305 controls operations of pretrial confinement hearings.

344. Vowell, *supra* note 120, at 174; Grove, *supra* note 19, at 31.

345. *Subcomm. Hearings on S. 2521, supra* note 228, at 56.

346. *Supra* note 16.

347. *Williams v. New York*, 337 U.S. 241, 249 (1949) (holding that criminal sentencing proceedings are nonadversarial). But see Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880,

1885-86 (arguing that *Williams* is no longer good law because it was based on the rehabilitative sentencing model).

348. *Mempa v. Rhay*, U.S. 128 (1967) (holding that sentencing is a critical stage).

349. GUIDELINES, *supra* note 8, at § 6A1.3 Commentary; see also *United States v. Fatico* 603 F.2d. 1053, 1057 n.9 (2d Cir. 1979).

350. The Supreme Court has not ruled on the applicability of the Sixth Amendment to the sentencing phase, but the circuit courts have addressed the issue. See, e.g., *United States v. Rodriguez* 897 F.2d 1324 (5th Cir.), *cert. denied*, 111 S. Ct. 158 (1990) (holding that right to confrontation is restricted during sentencing); *United States v. Romulus*, 949 F.2d 713 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1690 (1992) (acquitted conduct may be used to enhance punishment); *United States v. Salmon*, 948 F.2d 776 (D.C. Cir. 1991) (burden of proof on factual matters is preponderance of the evidence), *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir.), *cert. denied*, 110 S. Ct. 3302 (1990) (hearsay in PSR admissible if given opportunity to present witnesses or evidence to show unreliable).

351. *Supra* note 80.

352. Note, *supra* note 345, at 1890-92.

353. *Supra* note 231.

354. In 1950, the Army had 793 officers who could qualify

as judge advocates. That same year the Air Force had 274 officers who could qualify. Figures for the Navy are not available. *Subcomm. Hearings on H.R. 2498, supra* note 124, at 1174; Appendix.

355. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987); Military Rule 1.1.

356. Nagel, *supra* note 3, at 922.

357. *Supra* note 46.

358. *Id.* Congress recognized the problem and disbanded the United States Parole Commission effective 1994. Because the purpose of parole was to evaluate when an offender had learned his lesson and was ready to return to society as a productive member, Congress determined there was no need for parole in a sentencing system which did not have rehabilitation as a primary goal.

359. 10 U.S.C. § 952; Letter from Bruce R. Houston, Exec. Sec., Air Force Clemency and Parole Board, SAF Personnel Council, to the author (Feb. 2, 1993) (on file with author).

360. *A bill to amend titles 10, 14, and 37, United States Code, to provide for confinement and treatment of offenders against the Uniform Code of Military Justice, Hearing on H. R. 5783 By the House of Representatives Comm. on Armed Services, 90th Cong., 1st Sess. 68-70.*

361. Data collected indicate that only 0.1% of all long term military prisoners return to the military environment.

362. Grove, *supra* note 19, at 28. But see Schwender, *supra* note 22, at 33, 36. The author argues that sentencing is proportional. He asserts that the answer to absurd sentences is not rigid control, but training. Cf. Partridge and Eldridge, *supra* note 44, at 23, 33-34 (concluding that different experience levels or reputation (hanging judge versus light judge) were not causes of disparity.) During their study, the Eastern District of New York used a sentencing council. When those judges were polled individually, they had widely disparate sentences leading the authors to conclude that sentencing by committee does not lead to common sentencing approaches. In the districts which held training classes for their judges, wide disparity among the judges appeared. Absent an order to sentence a certain way, military judges of all kilns will not benefit from experience, training, or group sentencing. The findings also support the conclusion that members, who are untrained in the law, will benefit even less.

363. SUPPLEMENTARY REPORT, *supra* note 38, at 15.

364. *Id.* at 17; Nagel, *supra* note 3, at 930, 933; Selya and Kipp, *supra* note 34, at 11.

365. U. S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7-13 (1991). Since 1987 Congress passed over 100 mandatory minimum

sentences while at the same time expecting the Commission and its Guidelines to control sentencing disparity.

366. See, e.g., Freed, *supra* note 11, at 1751-52; ABA Survey, *supra* note 11, Survey of Federal District Judges, at 7; COMMISSION REPORT, *supra* note 2, at 422; Karle and Sager, *supra* note 11, at 429-30. Critics complain that the current mandatory minimums for certain drug offenses punish simple couriers as harsh as drug kingpins. Another area where mandatory minimums cause concern is under the firearms possession statute. Critics also that criminals who merely possess firearms when committing an offense should not be punished equally with criminals who actively use the firearms in commission of the offense. In both instances mandatory minimums require equal punishment and provide no departure relief.

367. See generally COMMISSION REPORT, *supra* note 2, ch. 4.

368. Freed, *supra* note 11, at 1751-52.

369. COMMISSION REPORT, *supra* note 2, at 422; Francesca D. Bowman, *The GAO and Sentencing Commission Impact Reports: Where's the Impact?*, 5 FED. SENT. R. 164 (1992).

370. Tonry, *supra* note 12; but see Schulhofer, *supra* note 12 (arguing that the Commission could not ignore Congressional mandates for minimum penalties).

371. 28 U.S.C. § 994. When the Commission issued its report in 1992, federal prisons were 37% over capacity. Studies conduct by the Bureau of Prisons estimated that even with the new

facilities being built, by 2010, prisons would be 60% over capacity. Because of other factors influencing imprisonment beside the Guidelines, neither the GAO nor the Commission could predict the impact on prison population resulting solely from the Guidelines.

372. Parent, *supra* note 51, at 1784-85 (noting that Minnesota tied its guidelines to prison capacity, but not without criticism).

373. See Tonry, *supra* notes 11 and 12; Karle and Sager, *supra* note 11, at 443.

374. *Id.*

375. Miller and Freed, *supra* note 12.

376. Ltr. from Houston, *supra* note 359. Legislative history indicates that the Navy and Marine Corps have occasionally used federal prison facilities, but the Army and Air Force have not. UCMJ, Art. 58 provides that military confinees may be sent to any military facility or federal facility. Also Congress in 28 U.S.C. 994 directed the Commission evaluate the possibility of using military prisons to house federal prisoners.

377. Telephone Interview with Markiewicz, *supra* note 21.

378. Letter from Mr. Thomas S. Markiewicz, Chief, Clemency, Corrections and Officer Review Division, U.S. Air Force to the author (Feb. 12, 1993) (on file with author). Mr. Markiewicz explained that category I facilities house prisoners for six

months or less, category II facilities house prisoners for two years or less. Any prisoners with approved sentences longer than two years are transferred to the Disciplinary Barracks as space comes available.

379. Telephone interview with Markiewicz, *supra* note 21 indicating that the Disciplinary Barracks is decreasing its capacity from 1500 to 893 in the next year for renovations and will not be returning to its former size. Letter from Markiewicz to the author, *supra* note 357 contains a note of the capacity for all military confinement facilities. That note indicates that total operational capacity of all facilities (CONUS), excluding the DB, is 3257 prisoners.

380. Selya and Kipp, *supra* note 34, at 11, 41-46.

381. *Id.* at 7.

382. GUIDELINES, *supra* note 8, at § 5K1.1.

383. GUIDELINES, *supra* note 8, at § 5K2.0.

384. *See, e.g., United States v. Doe*, 934 F.2d 353 (D.C. Cir). *cert. denied*, 112 S.Ct 268 (1991) (government must file motion, motion under Section 5K1.1 does not conflict with title 21 U.S. Code, Section 994(n) requirement for guidelines reflect substantial assistance). Tonry, *supra* note 12; Freed, *supra* note 11, at 1710-12. COMMISSION REPORT, *supra* note 2, at 19.

385. GAO REPORT, *supra* note 10, at 152; ABA Survey, *supra* note 11, Summary at 6, 9, and 10. *But see United States*

Sentencing Commission, 57 Fed. Reg. 32,246 (1992), 5 FED. SENT. REP.119 (1992) (requesting input into a two year study on section 5K1.1 departures). Suggestions have been made to the Commission from all fronts to provide for the judges to act *sua sponte* or let the defense raise the motion for the court's consideration. The Commission asserts, and DOJ concurs, that the motion should remain in the prosecutor's control because only he is in a position to determine how valuable the defendant's assistance has been.

386. See e.g., *United States v. Smith*, 953 F.2d 1060 (7th Cir. 1992) (holding that no review exists even for claims of bad faith or arbitrariness); *contra United States v. Khan*, 920 F.2d 1100 (2d Cir. 1990) (outlining procedure to assert bad faith), *cert. denied*, 111 S. Ct. 1606 (1991).

387. 112 U.S. 1840 (1992).

388. *Id.* at 1843-44.

389. *Supra* notes 203, 206. (the Court of Military Appeals in *United States v. Hill* limited the authority of the sentencing body).

390. GUIDELINES, *supra* note 8, at § 5K2.0 (Policy Statement).

391. Weinstein, *supra* note 23, at 8-9; Miller and Freed, *supra* note 12, at 3.

392. *Supra* note 54; GUIDELINES, *supra* note 8, at ch. 5, part H.

393. Weinstein, *supra* note 23, at 8-9; *see generally* Schulhofer, *supra* note 12.

394. *Williams*, 112 S. Ct. at 1119 (explaining the appropriate weight to give policy statements); *United States v. Headrick*, 963 F.2d 777 (5th Cir. 1992) (following *Williams* and including comparison of policy statements and guidelines); *but see United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992) (interpreting *Williams* to mean policy statements are not substitutes for guidelines but simply explanations on guideline application).

Just because Congress does not review policy statements before they are added to the Guidelines, does not mean Congress does not ever review the policy statements. Section 236 of the CCA provides that Congress will conduct a detailed review of the GAO and Commission Reports to determine the effectiveness of the Guidelines.

395. *See generally* Selya and Kipp, *supra* note 34.

396. GUIDELINES, *supra* note 8, at § 5K2.0.

397. Selya and Kipp, *supra* note 34.

398. *Supra* note 393.

399. 18 U.S.C. 3553(c), Weinstein, *supra* note 23, at 7-8.

400. *Compare, United States v. Brady*, 928 F.2d 844 (9th

Cir. 1991) (requiring identification of departure factors and specific reasons for amount of departure) with *United States v. Feinman*, F.2d 495, 501 (6th Cir. 1991) (ruling that specific reasons must be provided in a "short clear written statement or a reasoned statement from the bench.")

401. Because the purpose of military sentencing differs dramatically from federal sentencing and the CA retains clemency authority, personal characteristics should normally be considered irrelevant. As a result, departure practice should be minimal.

402. GAO REPORT, *supra* note 8, at 20-22, App. V; ABA Survey, *supra* note 11, Executive Summary, at 1. See also Tonry, *supra* note 11; *cf.* Bowman, *supra* note 369, at 4 (comparing GAO and Commission findings with the findings about the Massachusetts guidelines).

403. 18 U.S.C. § 3742. If the issue resulted from unlawful or erroneous application, the court "shall remand...with such instructions as the court considers appropriate."

404. *Supra* note 255. Appendix C illustrates the high percentage of cases eligible for review by the courts of military review that are appealed.

405. Appendix C reflects a steady decrease in the number of GCMs. As reflected in the appendix, over 90% of all reviewable courts-martial are appealed. Of those appealed, less than 10% were granted review by the Court of Military Appeals. Without reviewing each file individually, no alternative method exists to

ascertain the number of appeals resulting solely from sentencing issues.

406. *See generally supra* Section III.

407. *Supra* note 83.

408. *Subcomm. Hearings on S. 2521, supra* note 228, at 41, 49 (Statements of Mr. Taft, General Counsel of the DoD and Major General Bruton, The Judge Advocate General, U.S. Air Force).

409. *Cf. Parent, supra* note 51, at 1787-88 (commenting that the Commission tried to do too much, too fast in drafting the Guidelines).

410. *Cf. UCMJ, Art. 62.*

411. The accused does not require expedited appeal because of the availability of *writ of habeas corpus* proceedings. Government does not have the option of filing an extraordinary writ.

412. *Supra* note 230.

413. *See supra* note 250.

414. *Subcomm. Hearing on S. 857 and H.R. 4080, supra* note 122, at 1108 (Statement of Mr. Richard Wels, Chairman, Comm. on Military Justice of the New York County Lawyer's Assoc.).

415. *Subcomm. Hearing on S. 2521, supra* note 228, at 118. Appendix A indicates the wide disparity in sentencing for similar offenses. What the appendix does not reflect is the magnitude of the disparity. Although judge and member disparity seems

remarkably similar, the data reflect that more punishments toward the minimum and maximum were adjudged by members than military judge. In judge alone sentencing, the punishment range does not indicate the wide divergence in sentences. The GAO and Commission reports show that the Guidelines decrease disparity. As with any system, defining its goals and parameters determines the system's success. The ABA leads a list of critics who argue that in failing to define the Guidelines parameters, the Commission induced disparity, but the ABA survey also found that the Guidelines promoted uniformity and consistency.

416. *Cf. Comm. Report on S. 974, supra* note 227, at 2 (Statement of the Honorable Elwood H. (Bud) Hillis, a Representative from Indiana). Legislative consideration for judge alone sentencing had previously been tabled for further study, but Mr. Hollis' comments apply equally to using only a judge during sentencing.

417. Lovejoy, *supra* note 21. Forty-three states and the federal government do not use a jury in sentencing noncapital cases. Only Arkansas, Kentucky, Missouri, Oklahoma, Tennessee, Texas, and Virginia provide roles in the sentencing process for juries.

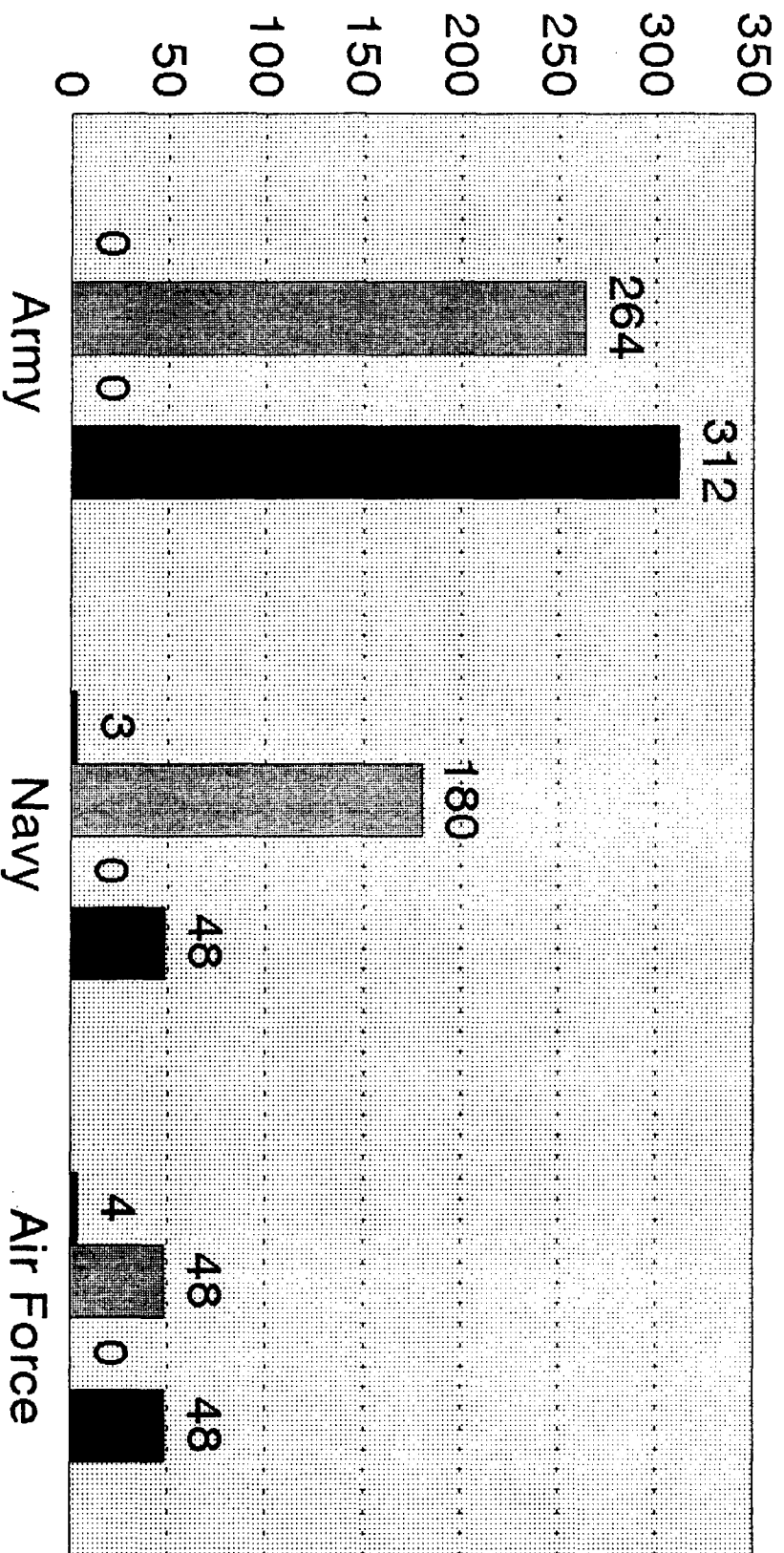
418. *See generally* Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992). The author discusses some of the problems with plea agreements to include their impact on disparity.

The data used for Appendix A suggest that plea agreements by the CA may interfere with a military committee's efforts to control disparity. An analysis of impact was not done, but an overview of the data showed that for certain offenses like rape, the CA routinely entered into pretrial agreements. In one case, the pretrial agreement reduced the adjudged confinement from five years to six months and many such examples appeared in the data. The committee will need to explore this issue thoroughly to head-off the problems that the Commission is now recognizing exist with plea bargaining under the Guidelines. The answer may be to limit the range of the sentence the CA can agree to accept by tying it to the sentencing bracket. Whatever the answer, impact on caseload and dockets will need to be considered.

419. *Senate Report on S. 857 and H.R. 4080, supra* note 122, at 84 (Statement of Senator Wayne Morse, Senator from Oregon).

SENTENCING RANGE

Drugs

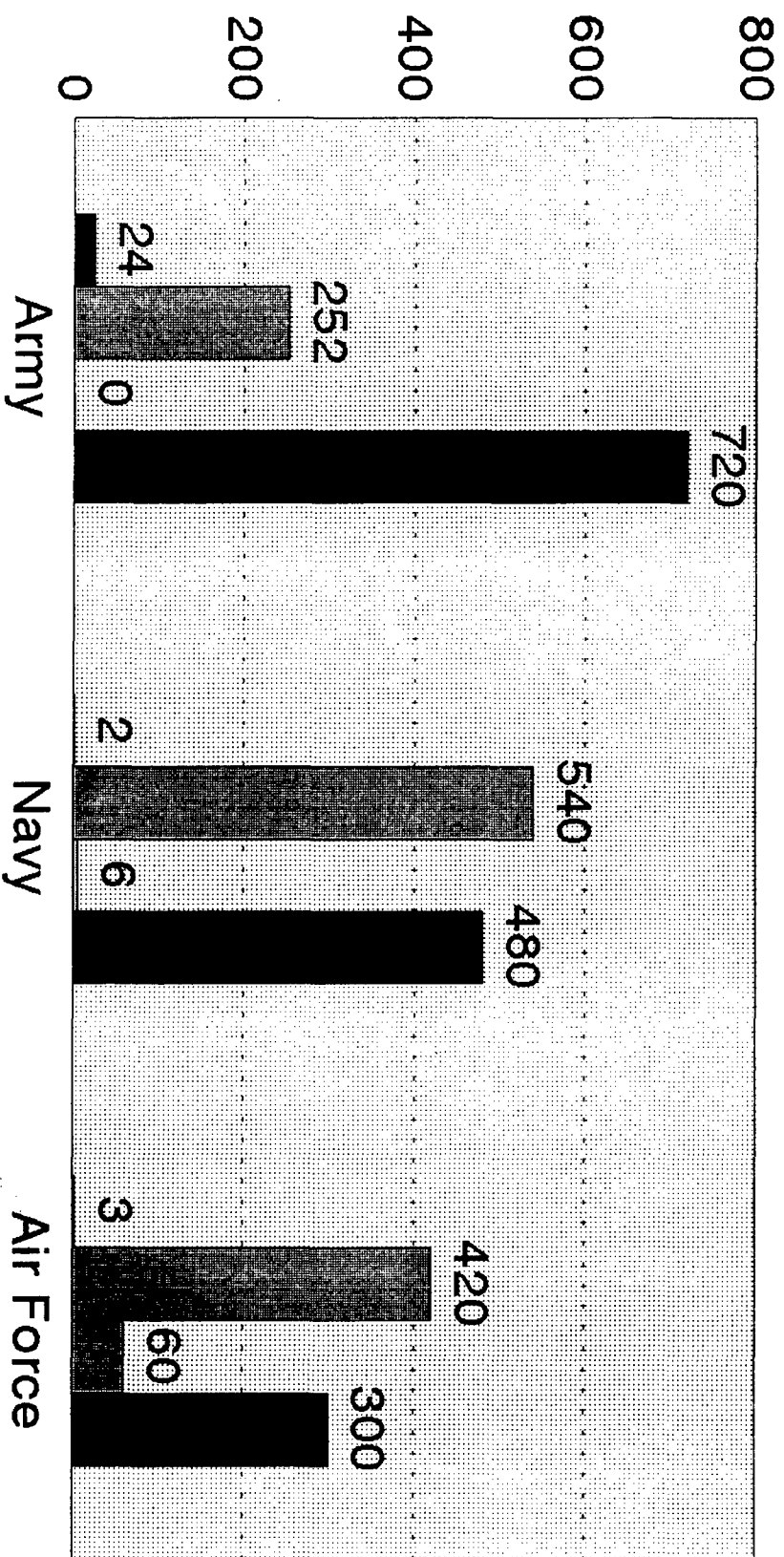


A-1

Data reflects 1992 figures in months

SENTENCING RANGE

Rape

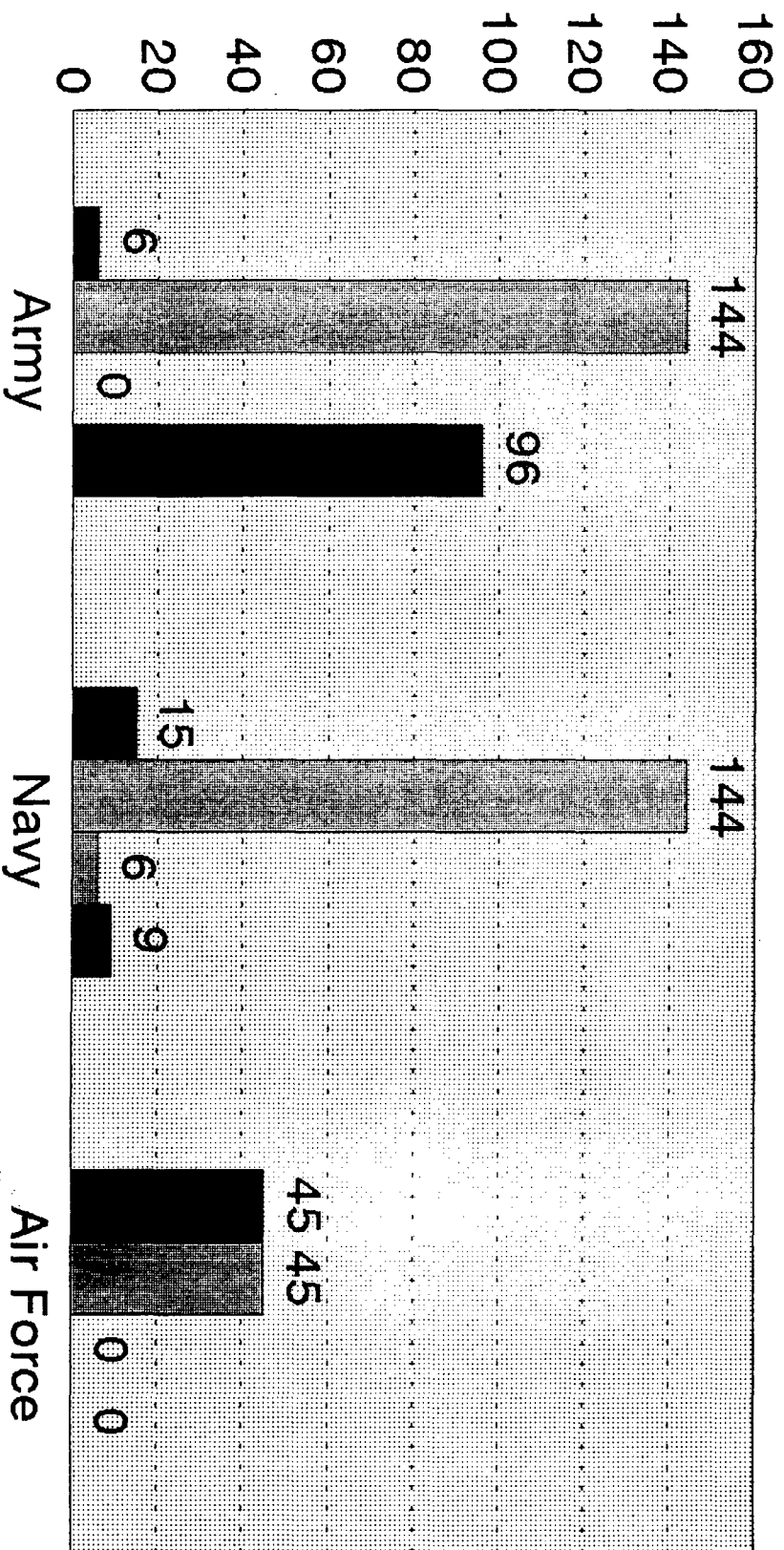


A-2

Date reflects 1992 figures in months

SENTENCING RANGE

Robbery

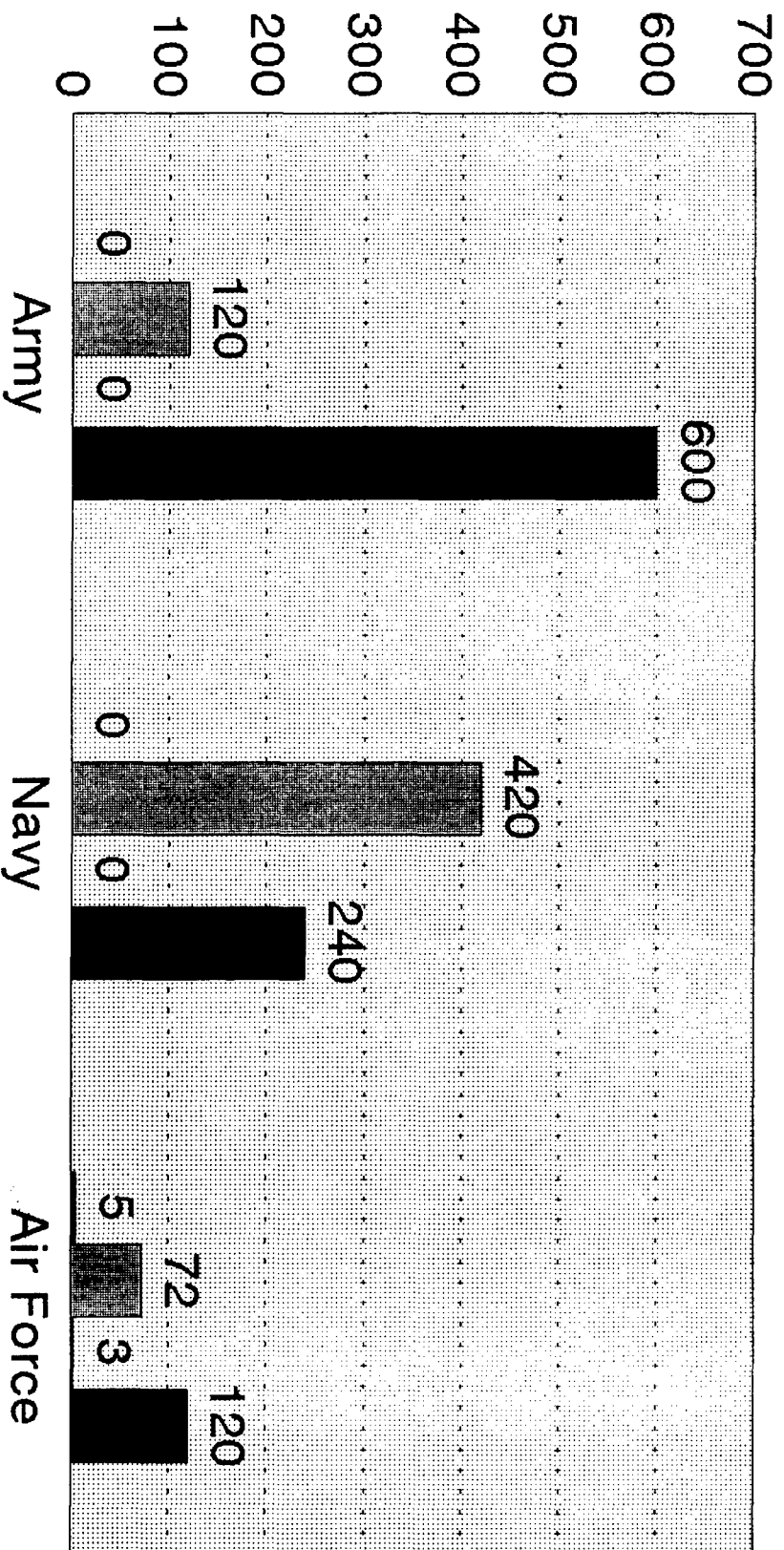


A-3

Date reflects 1992 figures in months

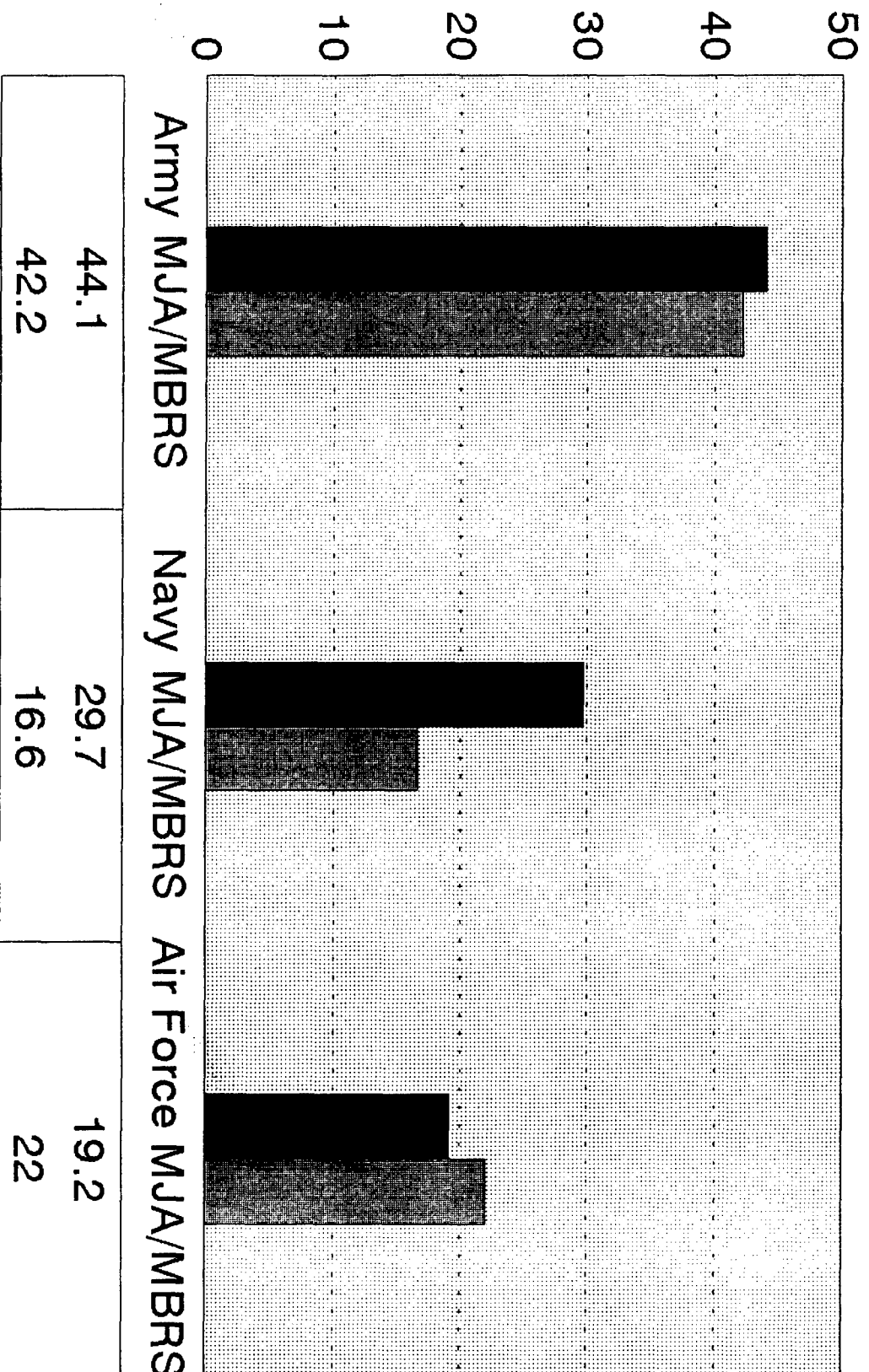
SENTENCING RANGE

Aggravated Assault



CONFINEMENT AVERAGE

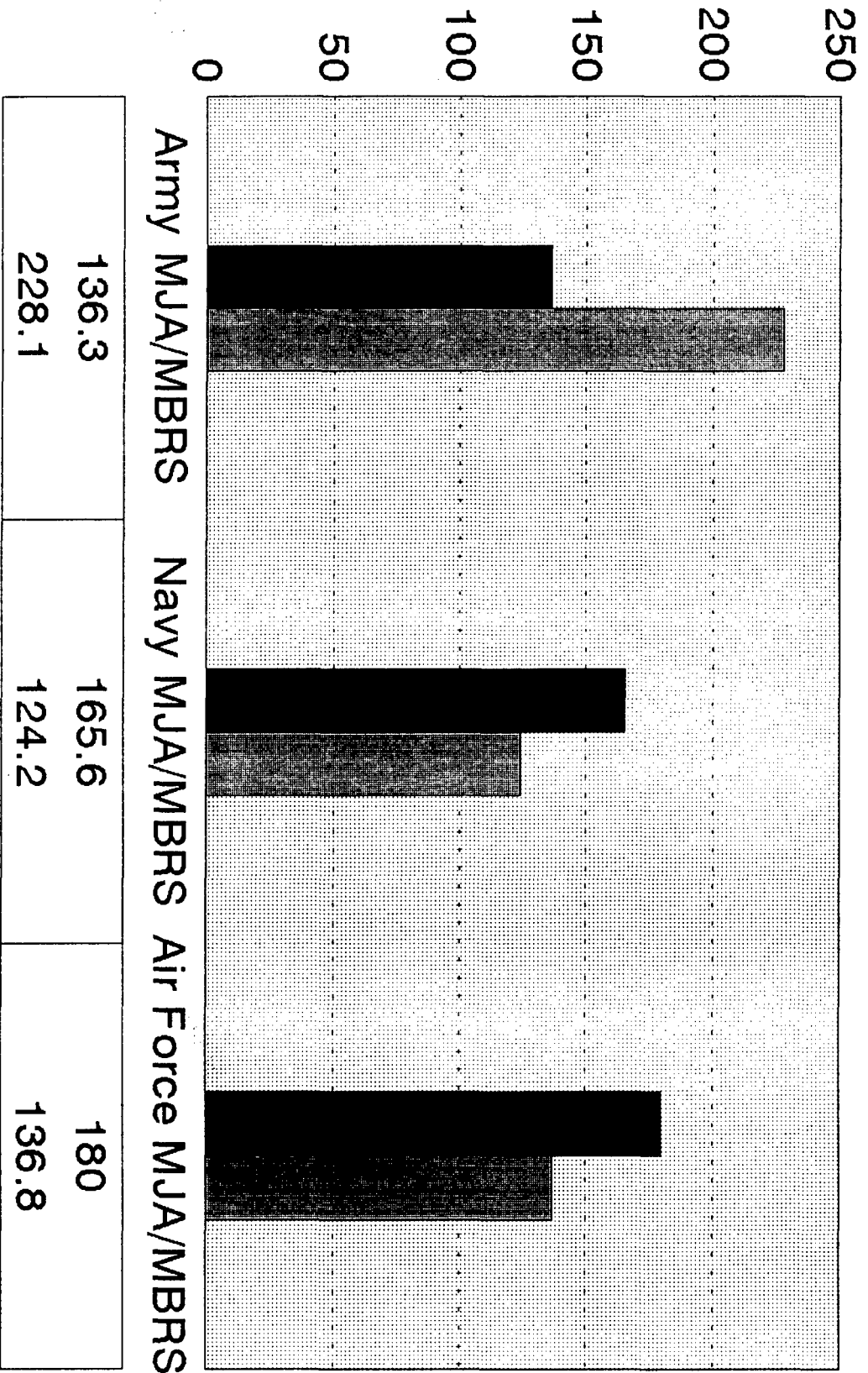
Drugs



Date reflects 1992 figures in months

CONFINEMENT AVERAGE

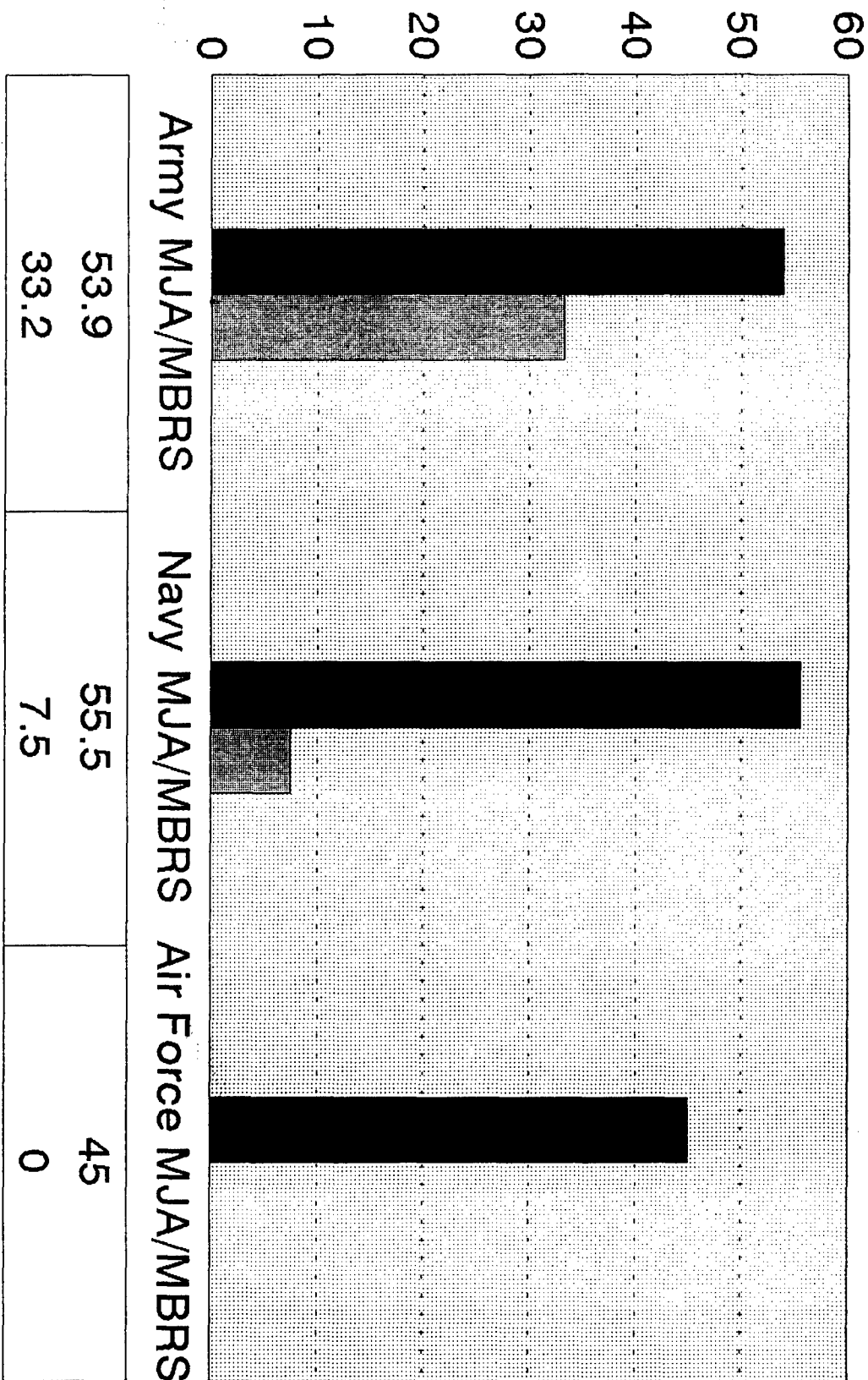
Rape



Date reflects 1992 figures in months

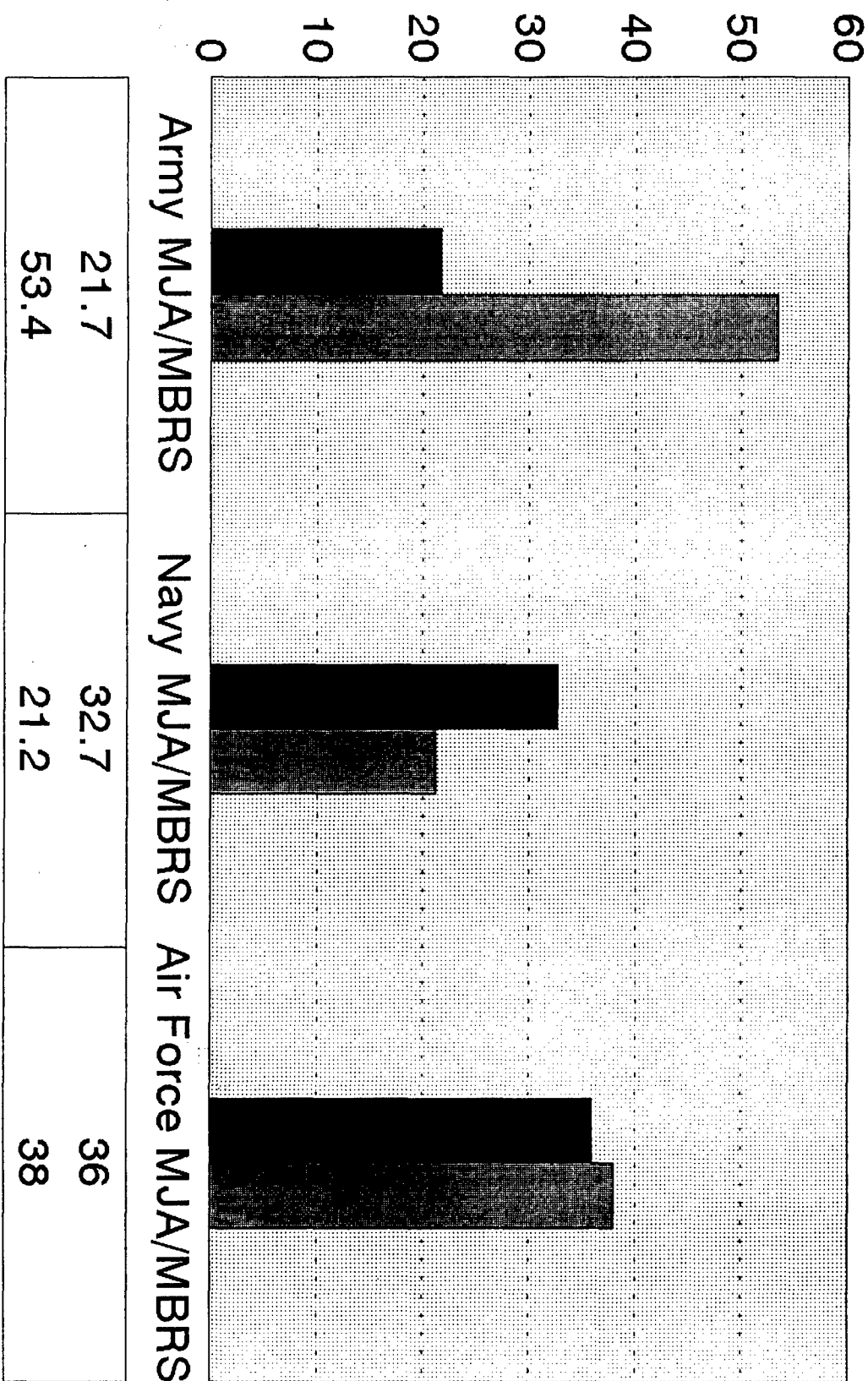
CONFINEMENT AVERAGE

Robbery



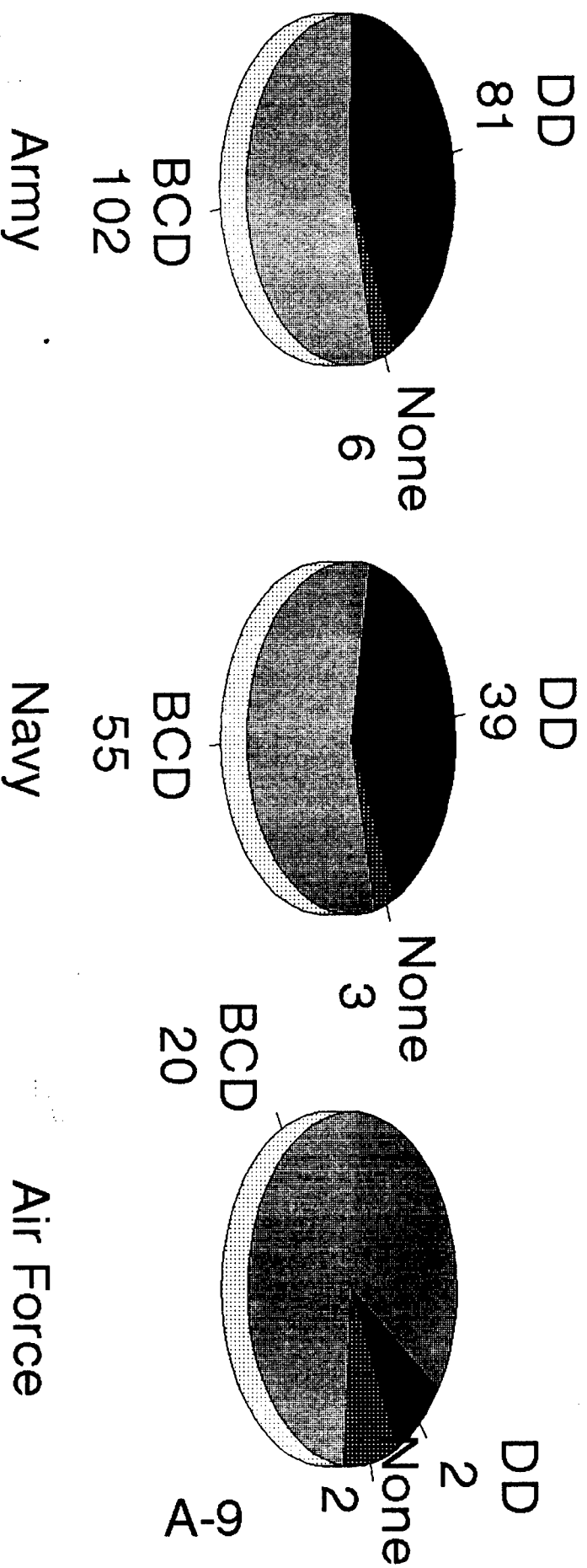
CONFINEMENT AVERAGE

Aggravated Assault



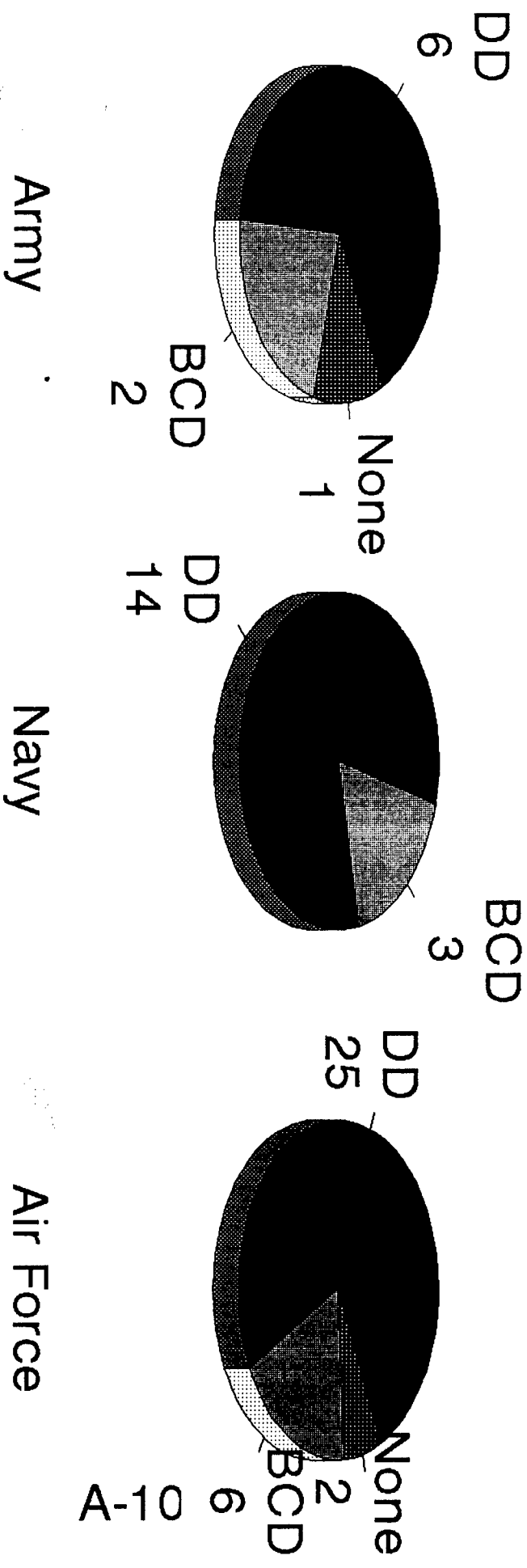
DISCHARGES

Drugs



DISCHARGES

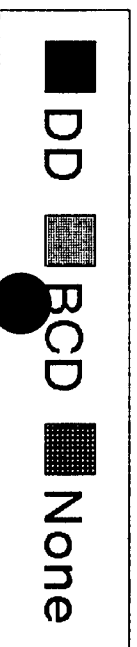
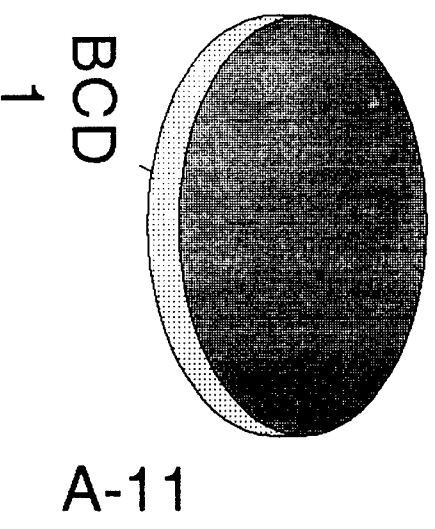
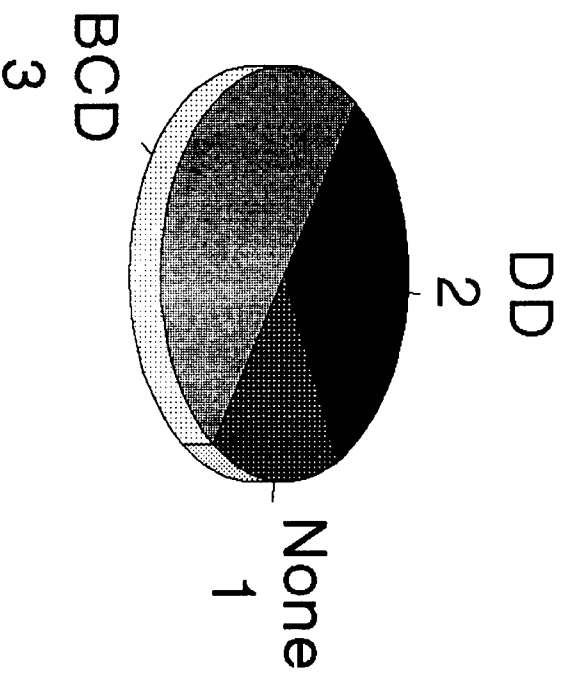
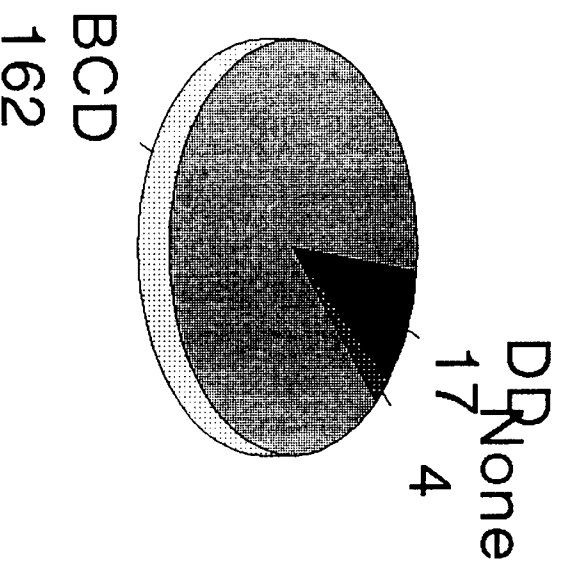
Rape



DD BCD None

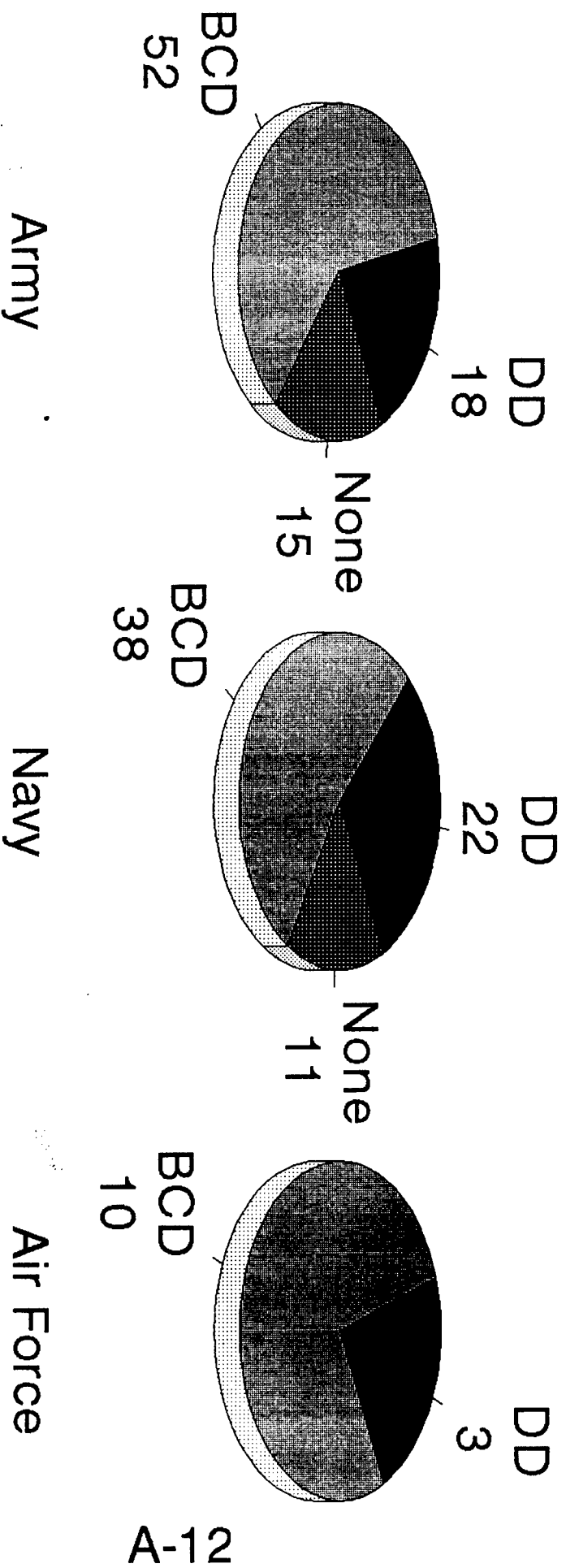
DISCHARGES

Robbery



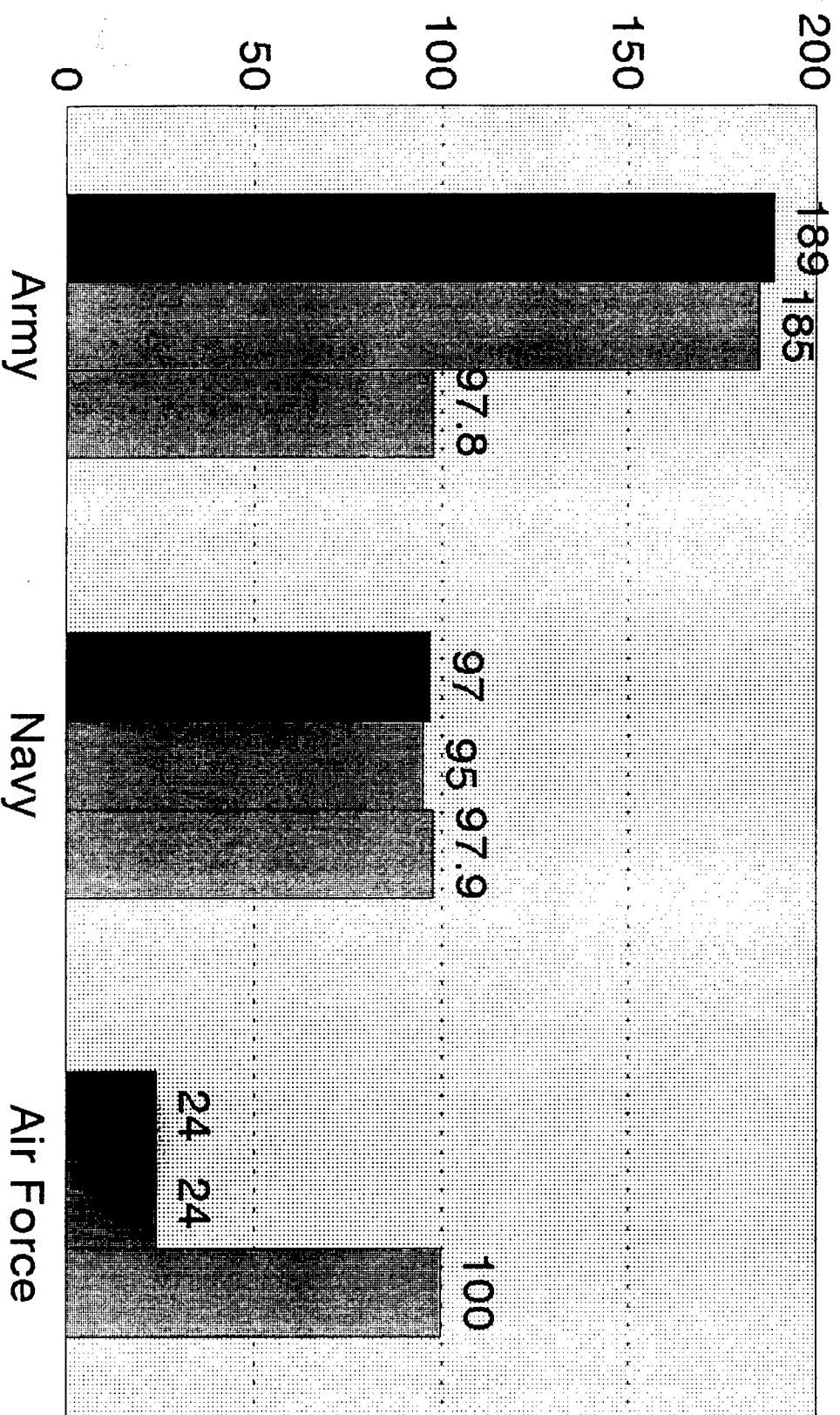
DISCHARGES

Aggravated Assault



PERCENT RECEIVING CONFINEMENT

Drugs

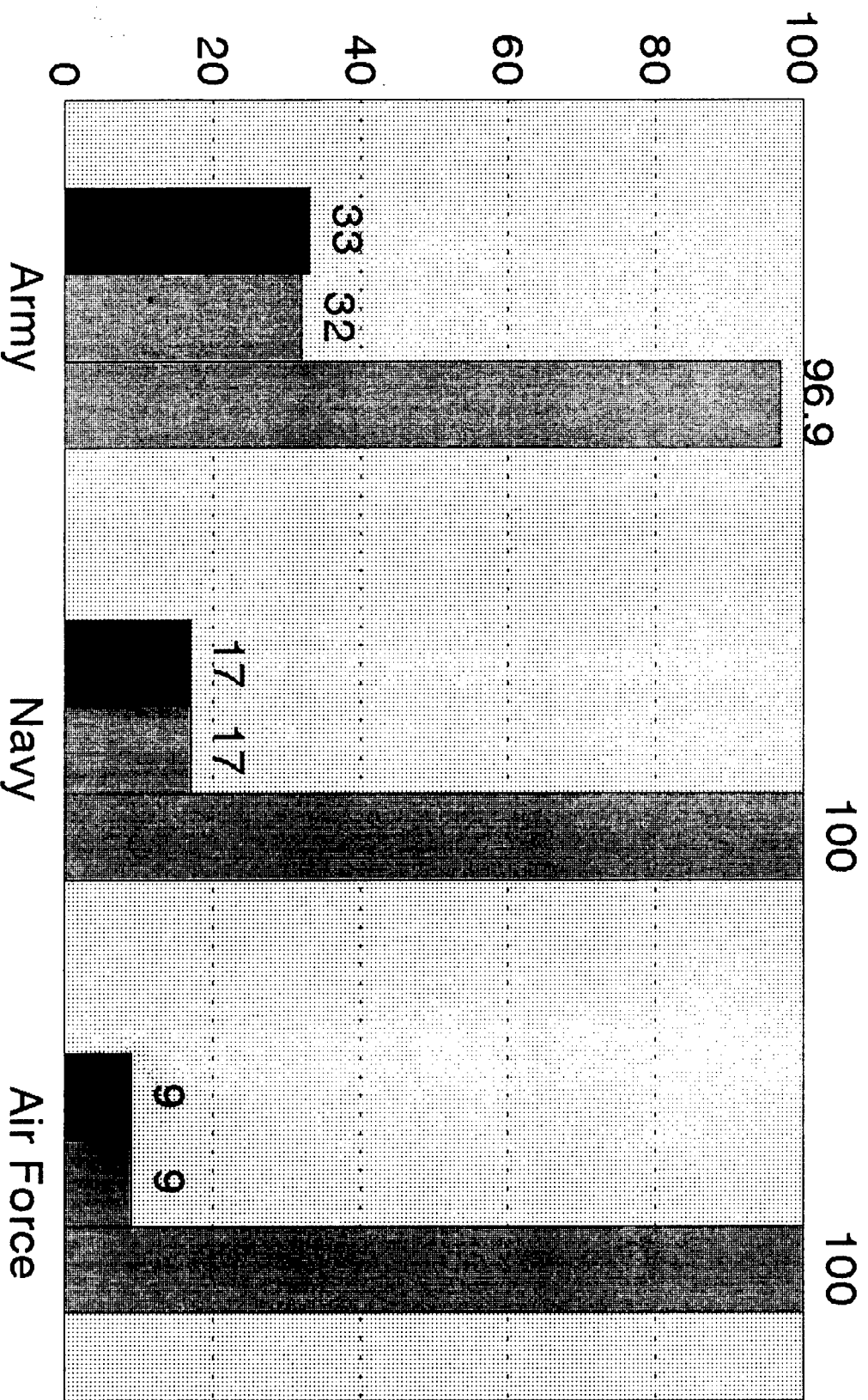


B-1

■ Total Cases ■ Confinement ■ Percentage

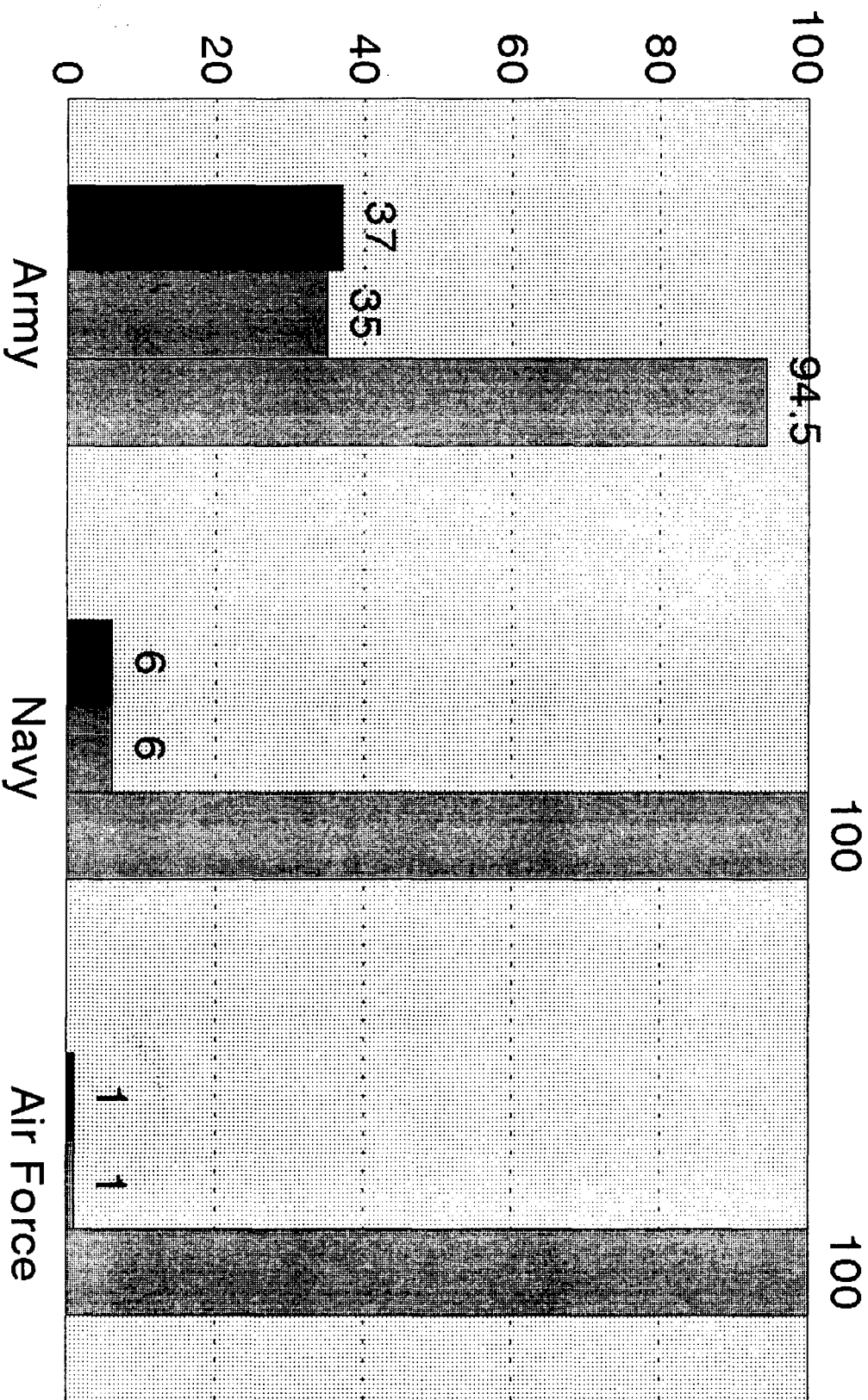
PERCENT RECEIVING CONFINEMENT

Rape



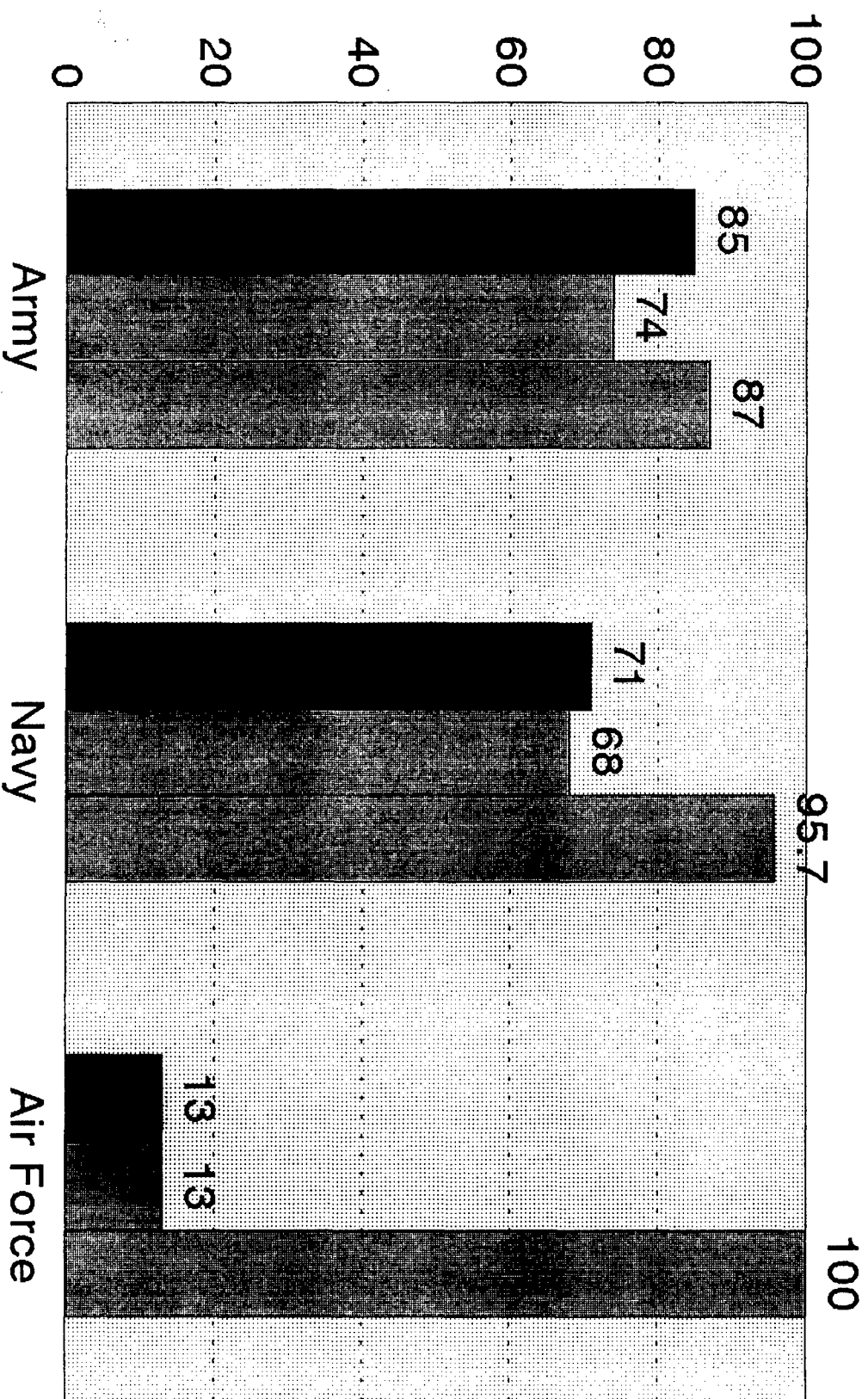
PERCENT RECEIVING CONFINEMENT

Robbery



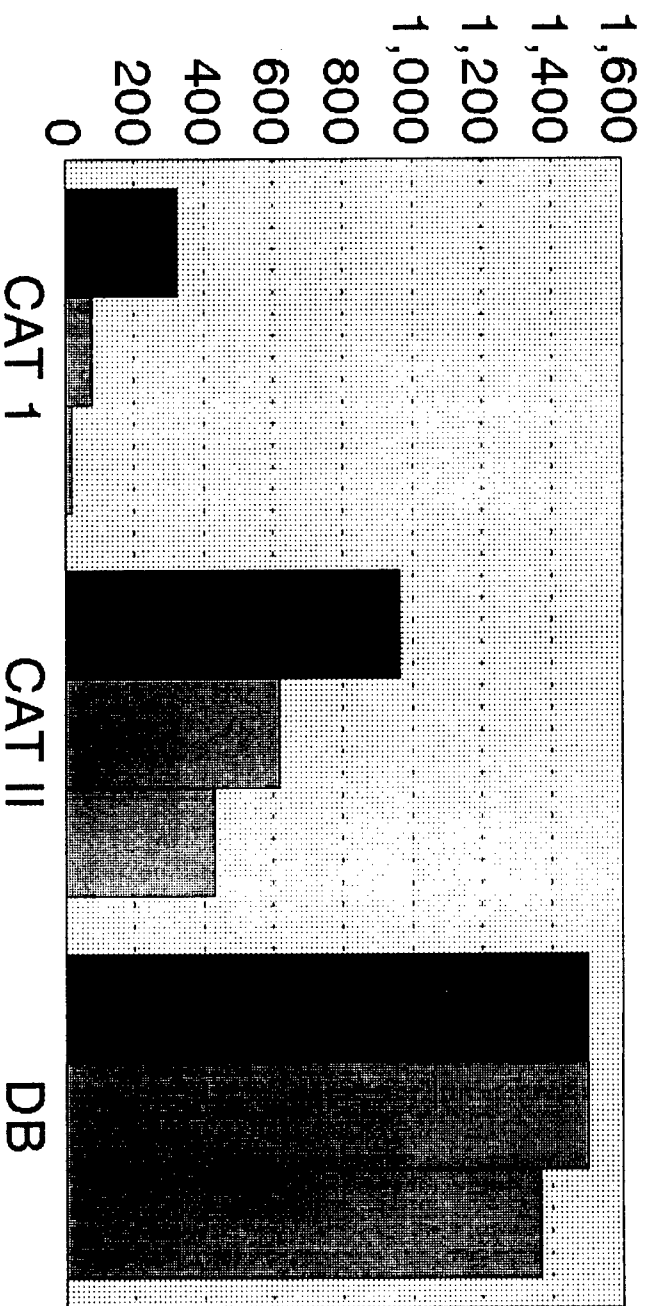
PERCENT RECEIVING CONFINEMENT

Aggravated Assault



CONFINEMENT FACILITIES

ARMY



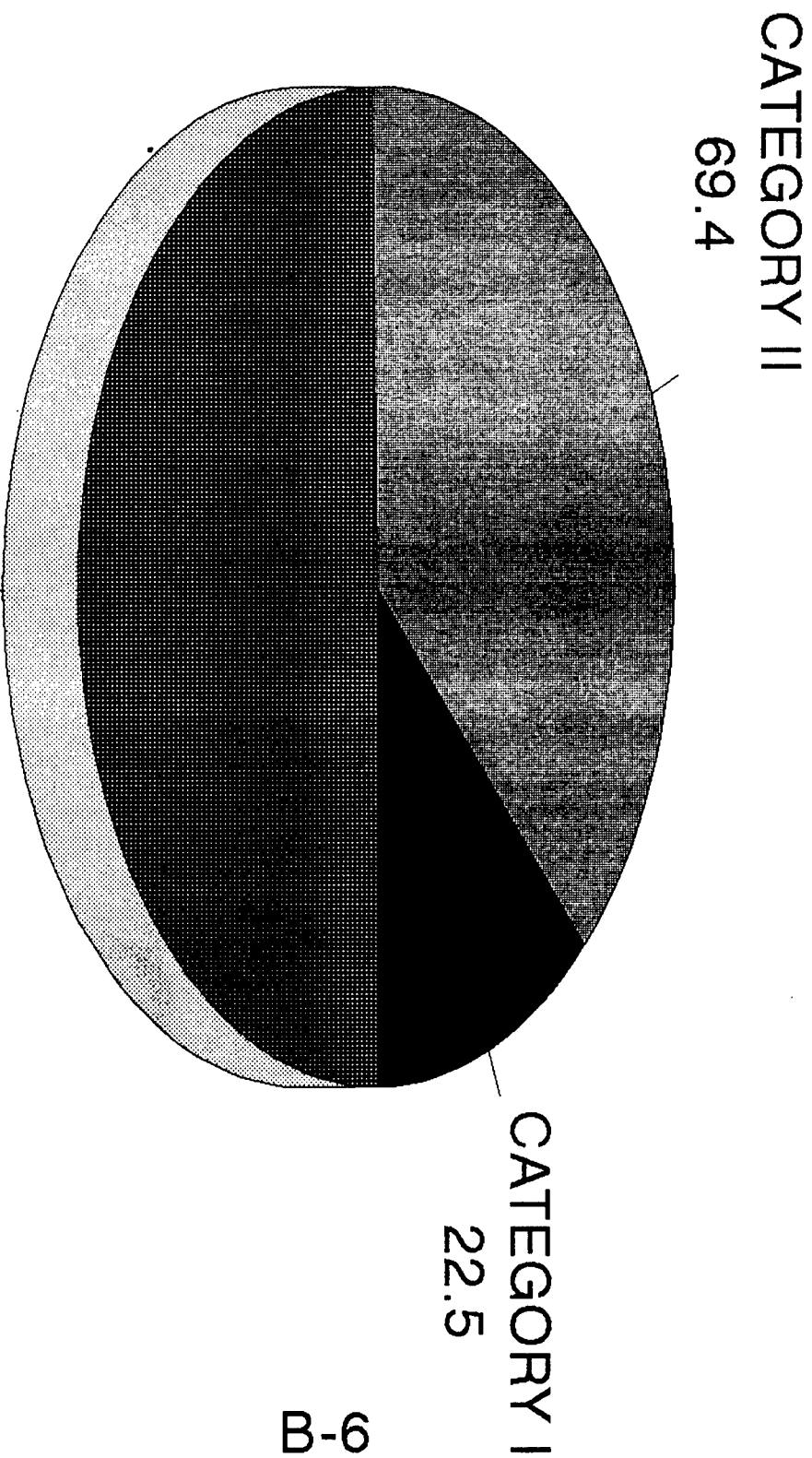
B-5

Total Capacity	325	966	1,503
Operational Capacity	80	617	1,503
Current Fill	18	428	1,368

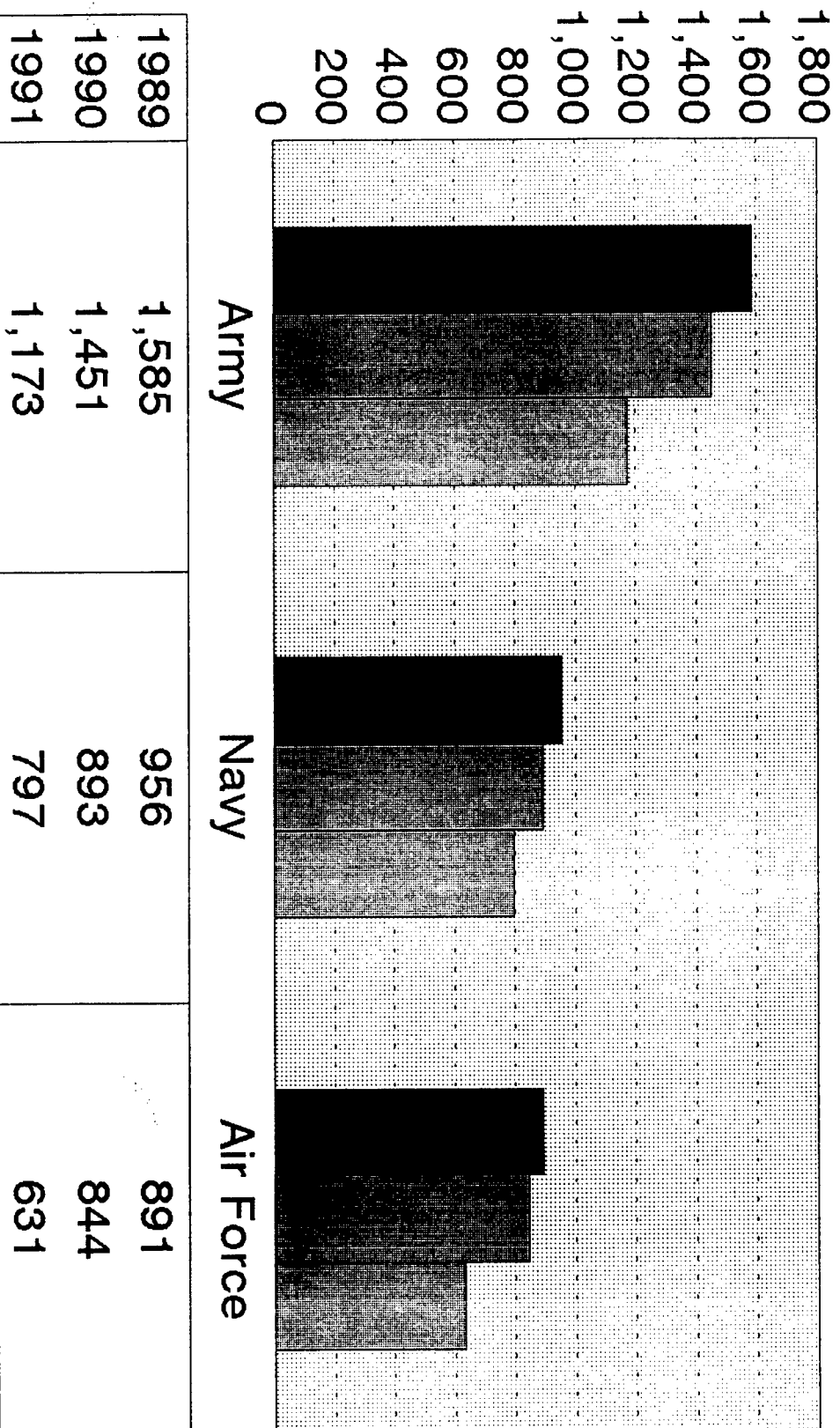
Total Capacity
 Operational Capacity
 Current Fill

COUS

ARMY CONFINEMENT PERCENTAGE FILL

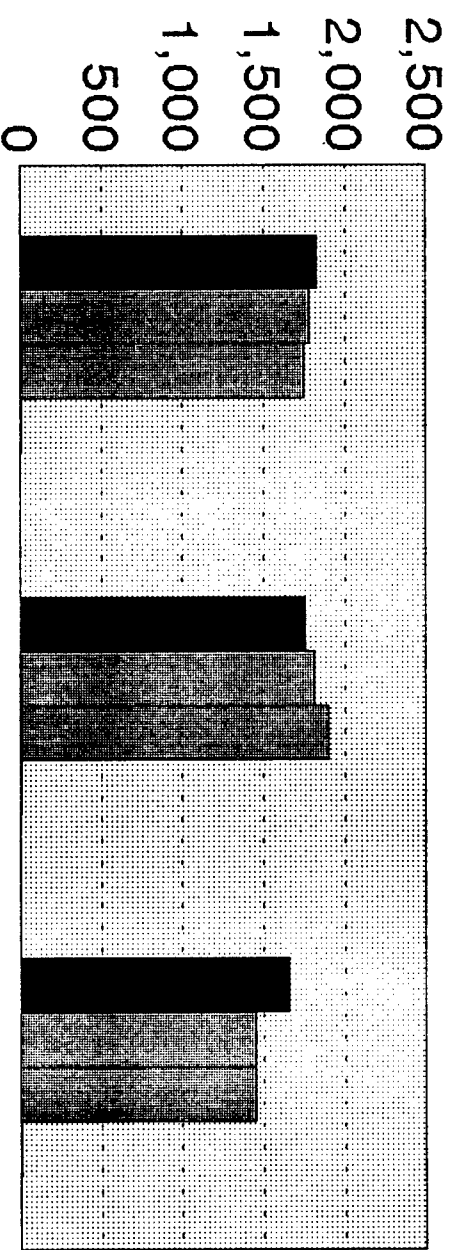


GENERAL COURTS-MARTIAL TOTAL



TOTAL ARMY CASES

STATISTICS



Total Cases	1,827	1,759	1,655
Cases Appealed	1,786	1,812	1,455
Cases Briefed CMR	1,752	1,903	1,455
Cases Briefed CMA (%)	6.5	9.4	10.2

Total Cases

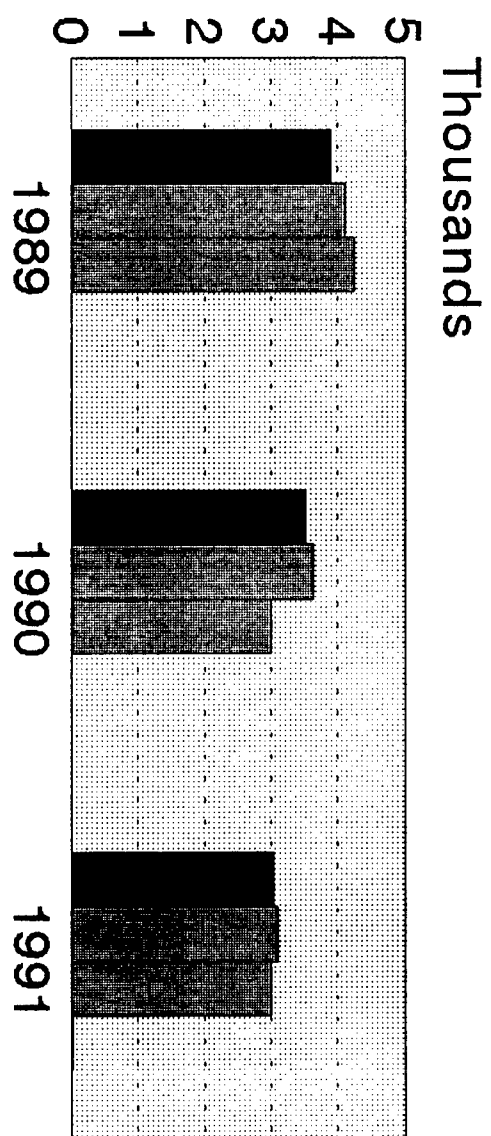
Cases Appealed

Cases Briefed CMR

Cases Briefed CMA (%)

Data includes BCD SPCMs

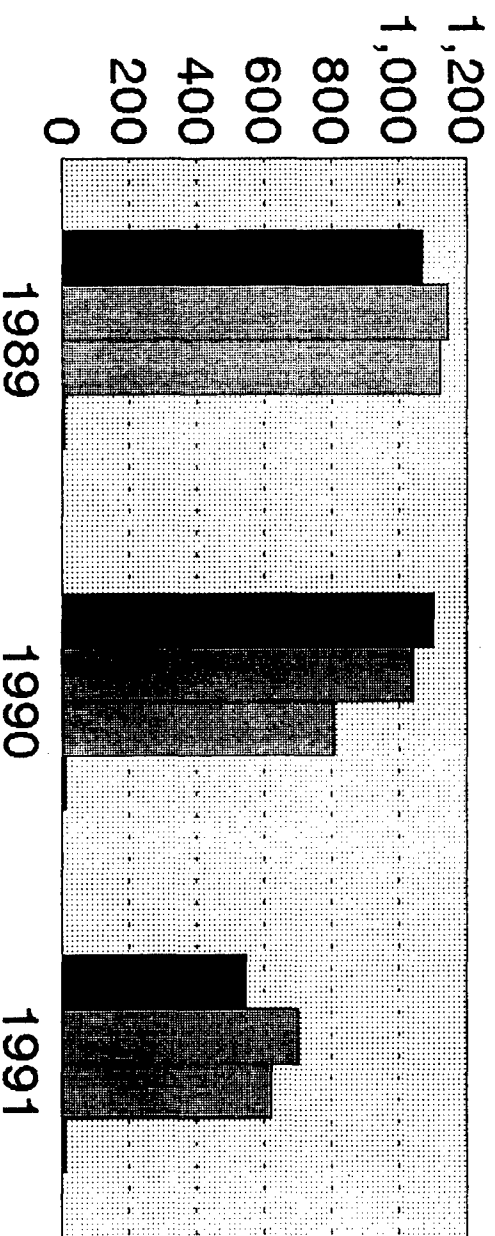
TOTAL NAVY CASES STATISTICS



Total Cases	3.891	3.525	3.037
Cases Appealed	4.1	3.632	3.094
Cases Briefed CMR	4.247	2.996	3.008
Cases Briefed CMA (%)	0.001	0.006	0.0068

Total Cases	Cases Appealed
Cases Briefed CMR	Cases Briefed CMA (%)

TOTAL AIR FORCE CASES STATISTICS



Total Cases	1,067	1,100	545
Cases Appealed	1,141	1,042	699
Cases Briefed CMR	1,118	805	621
Cases Briefed CMA (%)	6.6	9.5	9.1

- Total Cases
- Cases Appealed
- Cases Briefed CMR
- Cases Briefed CMA (%)

Data includes BCD SPCMs